88-968

No. 88-

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In The

Supreme Court of the United States

October Term, 1988

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioner,

v.

VANE NEWTON, ROBERT B. BAILEY, WAYNE A. MOORE, ROBERT L. DUNCAN, HAROLD E. JOHNSON, H. L. KIDD, JR., DONALD L. KIDD, JR., B. J. RUDE, MAX A. EADS, MILTON E. CAPPS, WILBUR STANTON, J.W. BURKE, JR., E. D. SNYDER, DANIEL V. MIDDOUR, STEPHEN R. EARLY, LEO T. SEEHAN, RICHARD A. NITCHER, JOHN E. BEGHTOL, JAMES F. RAMSEY, JOHN E. REECE, DALE MARTIN KEITH, JOHN R. STONE, DONALD D. BUHMANN, HOWARD A. TUTTLE, OSCAR D. OVERTON, W. R. URTON, ROBERT W. LUTH, MARK R. POMEROY, DAVID G. DICKEY, TERRY B. TURVOLD, CLYDE R. THOMAS, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and UNITED TRANSPORTATION UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorneys for Petitioner Brotherhood of Locomotive Engineers

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QUESTION PRESENTED

Having determined that an action brought by a group of locomotive engineers to set aside a seniority implementing agreement, entered into more than one and one-half years prior to the action's commencement, was barred by the analogous six-month limitation period of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and that their substantive claims did not lie in federal court, did the court below err in providing a remedy for the complaining engineers by ordering their claims be submitted to arbitration for a determination as to whether their rights were properly protected by the implementing agreement?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

All parties to the proceedings below whose claims requested relief from the petitioner Brotherhood of Locomotive Engineers ("BLE") are identified in the caption of this petition. The following named individuals did not file any complaint against petitioner BLE, but participated in the proceedings in which petitioner was involved in the district court:

Jack L. Chambers, Todd F. Chumbley, Larry K. Dixon, Kenneth L. Frazier, Alten R. Hammett, Ted E. Hanke, Robert Eugene Harrison, Robert L. Judge, Larry D. Love, David R. McBroom, Jerry F. McCracken, Charles H. Miller, Robert J. Murphy, Harlan W. Peterson, Dennis L. Schrader, Karl W. Seeburger, Ronald J. Stearns, John L. Strait, James W. Sundall, Billy Ray Wiggins, Robert Lee Wilson, B. J. Clark, John A. Myers, Ronald R. Werth, Daryl L. Schweiger, Robert J. Peoples, Roger L. Swift, Billy G. Williams, Roger L. Moore, Marquis R. West, James R. Mahoney, Charles E. Long, Paul E. Ellis, William D. Dixon, Richard E. Davidson, Donnie R. Wilford, Larry E. Whett, Charles T. Stickler, Robert N. McKemeken, James P. Emanuel, Jr., William H. Hein, Phillip H. Hein, Daniel L. Hein, Richard F. Davis, Larry D. Bruegel, G. N. Troxer, Hugh V. Steele, Eugene R. Tiselen, Lowell D. Molloy, Kenneth W. Brown, Richard H. Guile, Curtis E. Provance, Glen Dale Eads, Douglas L. Brower, Daniel J. Fuqua, Gary Grant Bowers, Earl F. Hill, Don R. Foland, Robert R. Doyle, Richard N. Petersen, John E. Brunskill, John D. Myers, Patrick M. Greene, Anthony C. Brackey, Richard A. Neuman II, Darrell Newman, Dennis D. Anderson, Joseph R. Fitzgerald, Tennis G. Gordon, Mike Arispe, Leland T. Dingman, Gary E. Yezek, David M. Johnson, Debra Sue Hornby, Craig Hamms Hornby, Tom A. Fox, Orville E. Harger,

Kerry S. Knutsen, John F. Myers, John R. Harrison, James L. Still, N. M. Cole, Edward L. DuBois, Randy E. Etherton, James M. Gass, Kenneth F. Kimberling, T. J. Reed, James L. Smith, Allan J. Thompson, James A. Tuttle, Eldon Zitterlich, L. Lee Beardsley, Marvin Meeker, Jack L. Shelton, Ralph L. McCoy, Lloyd E. Johnson, Donald P. McCaleb, Sam H. Dean, Donald E. Bisgaard, Robert W. Suaner, LaDon E. Crane, Roger L. Rothamel, Arnold M. Scheel, Frank M. Ramey, A. M. McQuade, Lloyd G. Andrews, Richard D. Thorsland, John R. Vincent, Dennis E. Chaplain, Paul W. Strawn, Max R. Williams, David G. Yackle, Francis E. Amiot, Allan P. Sherling, Jerry E. Payne, Richard A. Clark, Kenneth W. Brenig, Stephen D. Rosentangle and William E. Rosentangle.

Respondent Chicago and North Western Transportation Company is a corporation which, as far as petitioner is aware, has no partially owned subsidiaries or affiliates.

The three cases in which BLE appeared in the district court were consolidated with three other cases before the United States Court of Appeals for the Eighth Circuit. The names of the individuals who filed claims in the three cases in which BLE was not a party are:

Harold L. Kamp, James L. Knox, Steven Arthur Newton, George R. Etherton, Larry L. Williams, John F. Keith, Joseph A. Rush, Angeline V. Boll, Robert J. Tollakson, Dennis L. Stowe, Jack L. Chambers, Todd F. Chumbley, Larry K. Dixon, Kenneth L. Frazier, Alton R. Hammett, Ted E. Hanke, Robert Eugene Harrison, Robert L. Judge, Larry D. Love, David R. McBroom, Jerry F. McCracken, Charles H. Miller, Robert J. Murphy, Harlan W. Peterson, Dennis L. Schrader, Karl W. Seeburger, Ronald L. Stearns, John L. Stuart, James W. Sundall, Billy Ray Wiggins, Robert Lee Wilson, B. J. Clark, John

A. Myers, Ronald R. Werth, Daryl L. Schwerger and Ronald J. Peoples.

In addition to the Chicago North Western Transportation Company, the additional unions involved in those cases were the Railroad Yardmasters of America (now a division of the United Transportation Union) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (now named the Transportation-Communications International Union).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
BACKGROUND OF DISPUTE	4
CNW'S OPERATIONS OVER ROCK ISLAND LINES	7
PROCEEDINGS IN THE DISTRICT COURT	10
RULINGS OF THE EIGHTH CIRCUIT	11
REASONS FOR GRANTING THE WRIT	16
THIS CASE MERITS REVIEW BY THIS COURT DUE TO THE CONFLICT OF THE DECISION BELOW WITH THE RATIONALE OF THIS COURT'S DECISIONS AND THE DISTINCTIVE ISSUE POSED BY THE GRANT OF THE COURT OF APPEALS OF A REMEDY FOLLOWING ITS DETERMINATION THAT THE CLAIMS WERE JURISDICTIONALLY BARRED	16
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Alcorn v. Burlington Northern Transportation Company, Case No. 88-2412NE (appeal pending, 8th Cir.) 20

Allen v. United Transportation Union, Civil Action No. 88-0675-C-3 (United States District Court for The Eastern District of Missouri) 20

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 25

Barnett v. United Air Lines, Inc., 738 F.2d 358 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984) 17

Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974) 25

Brock v. Republic Airlines, Inc., 776 F.2d 523 (5th Cir. 1985) 17

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914 (7th Cir. 1985) 18

Chrysler Workers Ass'n v. Chrysler Corp., 663 F. Supp. 1150 (N.D. Ohio 1986) 22

Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) ..... *passim*

Dixon v. Martin, 260 F.2d 809 (5th Cir. 1958) 24

Emmons v. Southern Pacific Transportation Co., 701 F.2d 1112 (5th Cir. 1983) 24

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 24

Fountain v. Filson, 336 U.S. 681 (1949) 16

Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980) 24

In re Matter of Chicago, M. St. P. & P. R. Co., 713 F.2d 274 (7th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 5

TABLE OF AUTHORITIES—Continued

Page

International Association of Machinists v. Aloha Airlines, 781 F.2d 1400 (9th Cir. 1986) 17, 18, 23

Hunt v. Missouri Pacific R.R. Co., 729 F.2d 579 (8th Cir. 1984) 17

Kansas City Terminal Ry. Co.—Directed to Operate—Chicago, R. I. & P. R.R. Co. Debtor, 360 I.C.C. 289 (1979) 4

Knee v. Chemical Leaman Tank Lines, Inc., 293 F. Supp. 1094 (E.D. Pa. 1968) 25

Local 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180 (3d Cir. 1984) 19

Lodge 1424, International Ass'n of Machinists v. NLRB, 362 U.S. 411 (1960) 21, 22

Matter of Arbitration Between the Chicago and North Western Transportation Company and the United Transportation Union, Arbitration Board No. 406 9

Newton v. Chicago and North Western Transportation Company, Civil No. 83-641-D (United States District Court for the Southern District of Iowa, Central Div.) 10

Northampton & Bath R.R. Co.—Abandonment, 354 I.C.C. 784 (1976) 5

Oregon Short Line R.R.—Abandonment—Goshen, 360 I.C.C. 91 (1979) 4

Ranieri v. United Transportation Union, 743 F.2d 598 (7th Cir. 1984) 17

Reece v. Chicago and North Western Transportation Company, Civil No. 83-640-B (United States District Court for the Southern District of Iowa, Central Div.) 10

TABLE OF AUTHORITIES—Continued

Page

Reed v. United Transportation Union, 823 F.2d 1066 (4th Cir. 1987), *cert. granted*, 99 L. Ed. 2d 267 (1988) 18, 19

Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2d Cir. 1985) 18

Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1983) 5

Sisco v. Consolidated Rail Corp., 732 F.2d 118 (3d Cir. 1984) 17

Tennessee Central Ry. Co.—Abandonment, 333 I.C.C. 443 (1968) 5

Torres v. Oakland Scavenger Company, 487 U.S. —, 108 S. Ct. —, 101 L. Ed. 2d 285 (1988) 26

Triplett v. Local 308, Brotherhood of Railway and Airline Clerks, 801 F.2d 700 (4th Cir. 1986) 17

United Independent Flight Officers v. United Air Lines, Inc., 756 F.2d 1262 (7th Cir. 1985) 18, 21

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 17

United States for Use of Celanese Coatings Co. v. Gullard, 504 F.2d 466 (9th Cir. 1974) 25

Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2d Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984) 17

West v. Conrail, 481 U.S. —, 109 S. Ct. —, 95 L. Ed. 2d 32 (1987) 17

Wood v. Carpenter, 101 U.S. 135 (Otto), 25 L. Ed. 807 (1879) 23

STATUTES:

Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* 24

TABLE OF AUTHORITIES—Continued

Page

Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411, 412 18

Miller Act, 40 U.S.C. §§ 270a-270c 25

Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.* 4, 6

National Labor Relations Act, 29 U.S.C. § 160(b) 16

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* 10, 11, 18, 23

Regional Rail Reorganization Act, 45 U.S.C. §§ 797b, 797c, 797m 3, 11

Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1001, 1004, 1017 .....2, 6, 10, 21

MISCELLANEOUS:

126 Cong. Rec. H2376 (daily ed. March 31, 1980) 6

126 Cong. Rec. S892 (daily ed. Feb. 4, 1980) 6

126 Cong. Rec. S2271 (daily ed. March 6, 1980) 7

126 Cong. Rec. S2280-81 (daily ed. March 6, 1980) 7

I.C.C. Service Order No. 1445 (March 18, 1980) 7

I.C.C. Service Order No. 1473 (March 30, 1980) 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Brotherhood of Locomotive Engineers (''BLE''), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on June 15, 1988.

OPINIONS BELOW

The opinion of the court of appeals upon rehearing is reported at 850 F.2d 1255 and is reproduced in the Appendix ("App.") at 1a to 46a. This opinion superseded the court's opinion of January 8, 1988, which is reported at 836 F.2d 1493 and is reproduced in the Appendix at 47a to 91a. The opinions and rulings of the United States District Court for the Southern District of Iowa, dated April 16, 1985 and February 19, 1986, are unreported and, along with its order and judgment, are set forth at 93a to 127a of the Appendix.

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JURISDICTION

The original decision of the court of appeals was filed on January 8, 1988. Both BLE and the involved rail carrier timely filed petitions for rehearing and hearing en banc on January 22, 1988. On June 15, 1988, the court of appeals entered a decision on rehearing that superseded its original opinion. BLE and the Chicago and North Western Transportation Company were granted leave to July 13, 1988 in which to file petitions for rehearing and hearing en banc. Those petitions were denied on September 14, 1988. App. at 92a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

Sections 105 and 122 of the Rock Island Transition and Employee Assistance Act (45 U.S.C. §§ 1004, 1017) and

45 U.S.C. §§ 797b, 797c and 797m are set forth in the Appendix at 128a-133a.

STATEMENT OF THE CASE

This case calls into question the authority of a court of appeals to bypass the effect of the statute of limitations announced by the Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and also to create a remedy for locomotive engineers represented by BLE by submitting to arbitration the determination whether their rights were adequately protected under the terms of an implementing agreement entered into on February 16, 1982 by the Chicago and North Western Transportation Company ("CNW") with BLE. This remedy was created as a result of the action of the court of appeals in setting aside both an arbitration award, dated May 20, 1983, and an interim implementing agreement entered into on October 22, 1980 by CNW with the United Transportation Union ("UTU") for the crafts of conductors and trainmen. Although BLE and the respondent locomotive engineers were not parties to that agreement or arbitration, the court below determined that the same relief should apply to locomotive engineers even though the action of the respondent engineers was filed more than six months after the February 16, 1982 agreement had been executed by BLE and more than six months after any cause accrued as to each locomotive engineer who filed suit.

BACKGROUND OF DISPUTE

In 1979, the Chicago, Rock Island & Pacific Railroad Company ("Rock Island") went bankrupt. It was forced to discontinue service in September 1979. The Interstate Commerce Commission ("ICC") directed other railroads to provide temporary service over the Rock Island lines with the aid of federal funds. *Kansas City Terminal Ry. Co. - Directed to Operate - Chicago, R. I. & P. R.R. Co. Debtor*, 360 I.C.C. 289, 290 (1979).

In early 1980, the Federal Railroad Administration sought to insure continued service following the termination of the federally funded service and also to implement certain provisions in the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.*, relative to operation of the Milwaukee's lines by other carriers. Therefore, the Administration sponsored a meeting between thirteen railroads, other than the Milwaukee and Rock Island, and fifteen unions, including BLE and UTU. The purpose of the meeting was to achieve an agreement on labor protection that the carriers authorized to operate over the bankrupt lines found acceptable and that the rail employee organizations considered fair. CNW was a participating railroad.

Historically, the railroad brotherhoods have demanded extensive protections when employees are adversely affected by financial transactions of rail carriers, even in the case of abandonments. *See Oregon Short Line R.R. - Abandonment - Goshen,* 360 I.C.C. 91 (1979). Carriers were unwilling to voluntarily acquire or operate the Rock Island lines if that would subject them to the significant employee protection obligations ordinarily imposed by the

Commission in acquisition cases. *See e.g., In re Matter of Chicago, M. St. P. & P. R.R. Co.*, 713 F.2d 274, 278 (7th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). On the other hand, the employee representatives were concerned, because the ICC had refrained from imposing any labor protection at all in certain abandonments, such as whole line abandonments in which the rail carrier closes its entire operation, as did Rock Island. *See Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1983); *Northampton & Bath R.R. Co. - Abandonment*, 354 I.C.C. 784, 785-86 (1976); *Tennessee Central Ry. Co. - Abandonment*, 333 I.C.C. 443, 454 (1968).

On March 4, 1980 the railroads and unions entered into the so-called March 4th Agreement which had the purpose of providing "a fair, equitable and complete arrangement for protection of Milwaukee and Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner. . . ." (J.A. 131)[1] The Agreement was to "constitute the complete labor protection obligation of a purchasing carrier to the bankrupt carrier employees who are taken into its employ." (J.A. 132). Former Rock Island employees, who applied to fill the purchasing carrier's "necessary additional manpower requirements by craft due to its taking over [the] Rock Island," were to be hired in seniority order, and procedures were established for the acquiring carrier and craft

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[1] References to "J.A." are to the Joint Appendix before the court of appeals and those to "App." refer to the separately bound Appendix to the Petition.

representative to allocate seniority between those persons and the acquiring carrier's incumbent employees on the basis of subsequently negotiated implementing agreements or, in lieu of reaching an implementing agreement, by placing the Rock Island employees at the bottom of the applicable seniority roster. (J.A. 133, 135-39). In addition, each employee of a bankrupt carrier hired under the March 4th Agreement was provided a monthly compensation guarantee equal to 80 percent of the employee's average monthly straight-time earnings for a maximum of three years. (J.A. 141-43).

During the early months of 1980, Congress also considered legislation to maintain service on the Rock Island and to provide for the transfer of portions of the bankrupt to stronger rail carriers. 126 Cong. Rec. S892 (daily ed. Feb. 4, 1980). These deliberations led to the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1001 *et seq.*, on May 30, 1980. This Act gave, *inter alia,* the ICC power to authorize railroads to use the tracks and facilities of the Rock Island on a temporary basis, 45 U.S.C. § 1017, and a nationwide "first right of hire" for Rock Island employees seeking employment with other rail carriers, 45 U.S.C. § 1004. Although Congress sought to encourage the permanent acquisition of the lines, it did not want the Rock Island to become a drain on the federal treasury. *See e.g.,* 126 Cong. Rec. H2376 (daily ed. March 31, 1980). To induce these other carriers to take on Rock Island's operations, however, it was necessary, as in the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901 *et seq.,* to limit the acquiring carrier's obligations for employee protection. Being aware of the March 4th Agreement Congress did not impose any additional employee

protection obligations upon acquiring railroads, other than the right of first hire. *See* 126 Cong. Rec. S2771 (daily ed. March 6, 1980) (statement of Sen. McClure); 126 Cong. Rec. S2280-81 (daily ed. March 6, 1980) (statement of Sen. Kassebaum).

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CNW'S OPERATIONS OVER ROCK ISLAND LINES

On March 18, 1980, the ICC authorized CNW to conduct temporary operations over certain portions of the former Rock Island lines. *See* I.C.C. Service Order No. 1445 (March 18, 1980) (J.A. 232). In this order, the Commission found the March 4th Agreement "adequately safeguards the interests of affected employees." *Ibid.* On May 30, 1980, the Commission, acting pursuant to Section 122 of the Rock Island Act passed that same day, authorized CNW to provide interim service over those former Rock Island lines immediately. *See I.C.C.* Service Order No. 1473 (May 30, 1980) (J.A. 252). Interim service was provided by CNW to June 20, 1983, when the Bankruptcy Court presiding over the Rock Island proceeding approved permanent acquisition by the CNW. CNW owns and continues to provide service over these lines.

Upon commencing operations over the Rock Island in March 1980, CNW provided the notifications required by the March 4th Agreement, including its determination of the additional manpower it decided it needed to perform interim service on the former Rock Island Lines. (J.A. 1363-64). To fill those requirements, CNW hired the most senior eligible Rock Island employees who applied and

accepted jobs. Subsequently, CNW hired a number of other former Rock Island employees as "new hires" to fill positions arising from traffic requirements determined by the carrier to be caused by reasons other than the take-over of the Rock Island lines. (J.A. 1364).

Article II, Section 9 of the March 4th Agreement specifies, in part, that implementing agreements were to "be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier." Accordingly, CNW and the respective unions, including BLE, negotiated implementing agreements allocating seniority between former Rock Island employees hired pursuant to the March 4th Agreement and incumbent CNW employees. (J.A. 1364-65). On February 16, 1982, final implementing agreements for engine service employees (crafts of locomotive engineers and firemen) were signed by CNW with the two unions representing those employees (BLE and UTU-E). (J.A. 1365, 1399, 1416).

However, no final implementing agreement could be reached by CNW with UTU-T&C relative to ground service employees (crafts of trainmen and switchmen). Although an interim agreement had been reached on October 22, 1980, which gave former Rock Island trainmen employees hired under the March 4th Agreement preferential rights to a number of jobs attributable to the take-over of Rock Island lines, but not to other jobs, UTU representatives of the Rock Island objected. (J.A. 1365). The question as to how seniority should be allocated among

the trainmen was submitted to arbitration under the Railway Labor Act. Both Rock Island and CNW trainmen participated in that arbitration. (J.A. 226, 268).

On May 20, 1983, the arbitrator appointed by the National Mediation Board issued his award. *Matter of Arbitration Between the Chicago and North Western Transportation Company and the United Transportation Union.* (J.A. 1355). The award rejected the claim of the former Rock Island trainmen for "strict dovetailing," which would have given them their hiring date on Rock Island as their seniority date on CNW, because dovetailing would have permitted the former Rock Island employees to displace many of the senior CNW employees from their jobs and to outbid CNW employees for jobs that were not due to the acquisition. (J.A. 1359-60). The arbitrator found that the March 4th Agreement "was designed to provide only limited relief to employees of failing railroads" and was not intended to "place the employees of the acquiring railroad in a distinct disadvantage." (J.A. 1360). Finding dovetailing would interfere with the "vested seniority rights" of the senior CNW ground service employees, the arbitrator concluded dovetailing would be inconsistent with the March 4th Agreement. With some alteration, the Award of Arbitration Board No. 406 adopted the preferential rights that had been established by the October 22, 1980 interim agreement. (J.A. 1360-61). The award relating to ground service personnel was substantially similiar to the final implementing agreements which had already been entered into by BLE and UTU-E on February 16, 1982 for engineers and firemen.

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PROCEEDINGS IN THE DISTRICT COURT

Six complaints containing 158 individual counts were filed in behalf of 158 former employees of the Rock Island against CNW and four separate unions, one of which was the BLE. The first two cases, *Newton v. Chicago and North Western Transportation Company* and *Reece v. Chicago and North Western Transportation Company,* were started on November 18, 1983. The remaining four cases were filed on February 2, 1984, with additional plaintiffs thereafter added on April 25, 1984 by amended complaints. Each complaint asserted employment and seniority claims against CNW predicated upon Sections 105 and 122 of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1004 and 1017, and the March 4th Agreement. (J.A. 131-146). Each of the individual counts in the complaints also asserted a claim of unfair representation under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, against the union to which that plaintiff belonged on the basis of the terms of the final implementing agreement. Of the 158 plaintiffs, 33 had been hired by the CNW in 1980 pursuant to the March 4th Agreement, 44 had been hired in 1980 or early 1981 but not pursuant to the March 4th Agreement, and 81 were never hired by CNW. Only those ground service employees hired under the March 4th Agreement (totaling 14 trainmen and switchmen) also alleged unfair representation by UTU in failing to provide adequate representation at the arbitration of their seniority rights.

In a series of rulings on dispositive motions, the district court dismissed all plaintiffs' claims. The claims under Section 105 of the Rock Island Act were held sub-

ject to the exclusive jurisdiction of the Railroad Retirement Board and the Railroad Adjustment Board by reason of 45 U.S.C. § 797c(g). The claims under Section 122 of the Rock Island Act were dismissed on the ground that the statute did not create a private right of action. The court held that the claims brought under the March 4th Agreement were claims as to the interpretation and application of a collective bargaining agreement and, therefore, within the exclusive jurisdiction of the Railway Labor Act arbitration set forth in 45 U.S.C. § 153. The district court held that the unfair representation claims, except the ground service employees' claim that UTU had breached its duty in the arbitration before Arbitration Board No. 406, had not been asserted within six months after their accrual and were barred by limitations. Subsequently, the district court granted summary judgment on the ground service employees' unfair representation claims. App. 126a.

Those rulings were appealed.

RULINGS OF THE EIGHTH CIRCUIT

Although this petition relates to those locomotive engineers who sued BLE on the basis that the BLE-CNW February 16, 1982 implementing agreement was invalid because it contravened the terms of the March 4th Agreement and violated BLE's duty of fair representation, it is necessary to summarize the court of appeals' decision as to the ground service plaintiffs represented by UTU in order to understand the remedy fashioned by and imposed upon BLE and the CNW locomotive engineers.

In its opinion of January 8, 1988, the Eighth Circuit affirmed each of the rulings of the district court, including the ruling that the former Rock Island employees' unfair representation claims were time-barred:

> In terms of the unfair representation claims brought by the former Rock Island employees, we agree with the district court, both in that these claims are governed by the six-month statute of limitation set forth by the Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) and that all of appellants' claims are thus barred.

836 F.2d at 1503.

Thus, the appellate court upheld the district court's ruling that the ground service employees' claims derived from alleged improprieties in the negotiation of the 1980 UTU-CNW interim agreement were time-barred. Nevertheless, the court proceeded to direct the district court to set aside both the award of Arbitration Board No. 406 and the UTU-CNW interim agreement on the ground that UTU had engaged in unfair representation. It held the arbitration invalid on the basis that the UTU had committed unfair representation as a matter of law by allowing both the CNW and the former Rock Island ground service employees to present their cases to Arbitration Board No. 406.

To reach this conclusion, the court below relied upon its own interpretation of Article 90 of the UTU Constitution. That article provides, in part, that where a line of a carrier is taken by another, the UTU officers "shall arrange for a fair and equitable division of the work," preserving "[p]rior seniority rights . . . to the extent pos-

sible," (836 F.2d at 1498, 1499 nn. 8 & 9). Even though Article 90 does not preclude arbitration to make that determination and does not, on its face, express that "the union should have entered the arbitration with a unified position and actively sought [hiring date] seniority for Rock Island employees," the court rejected UTU's interpretation of its organic law. 836 at F.2d at 1507. Moreover, the court threw out the October 22, 1980 interim implementing agreement, because the language of the March 4th Agreement was "highly ambiguous" and the former Rock Island ground service employees belonging to UTU should, therefore, have been sponsored by UTU's International to "active[ly] and significant[ly] participat[e]" in those negotiations. 836 F.2d at 1507. Accordingly, the court directed the district court to set aside the award and the interim implementing agreement, to direct UTU to come up with a unified position relating to the seniority of ground service employees and to require negotiations between CNW and UTU and, upon the failure to reach agreement, the submission of the dispute to arbitration. *Id.* at 1508.

Notwithstanding the fact that the unfair representations claims against BLE were time-barred and that the UTU's arbitration and interim agreement had no relevancy to BLE and the locomotive engineers, the Eighth Circuit nevertheless stated: "Given the fact that the appellants' substantive claims cannot properly be brought in federal court, we now turn to the task of determining what remedies, if any, remain available to them." *Id.*, 1503. Though no explanation was given as to what was left to determine insofar as engine service employees, the court below decided that even those plaintiffs were entitl-

ed to some relief. It, therefore, set aside the February 16, 1982 implementing agreement for locomotive engineers and directed the trial court to require BLE to go through the same process that UTU was obligated to do. *Id.* at 1509. The court based this ruling without evidence and merely upon the Rock Island employees' "alleg[ation] that those implementing agreements were hopelessly biased because former Rock Island employees had no role in securing them and because they were negotiated by those with interests adverse to their own." *Id.*, 1508-09.

Upon rehearing requested by CNW and BLE, the court of appeals substituted a revised opinion on June 15, 1988. As in its original opinion, the court relied upon the UTU arbitration to bootstrap a remedy for *all* former Rock Island employees represented by the unions. Basically, the court on rehearing attempted to bolster its legal arguments for setting aside the UTU arbitration award on the basis that "in deferring to the fundamentally flawed agreement, the arbitrator's decision was not in any way derived from the 'wording or purpose of the collective bargaining agreement.'" 850 F.2d 1269. The court then proceeded to apply the remedy contained in its original opinion.

Without any explanation, the same reasoning and same relief was applied to the locomotive engineers represented by BLE.[2] On this score, the court below merely said (*id.* at 1274):

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2 Contrary to fact and law, the panel found that "twenty four of the March 4th appellants were former engine service employees represented by both the UTU and the BLE." 850

(Continued on following page)

> The Newton engine service employees claim that the seniority they received under the implementing agreements of February 22 (sic), 1982, was inadequate under the terms of the March 4th Agreement. The CNW answers that these employees were treated fairly.
>
> We hold that the March 4th Engine Service plaintiffs have the right to have their claims submitted to a neutral arbitrator to determine whether their seniority rights were adequately protected under the terms of the February 22 (sic), 1982 implementing agreement. Appellants' claims are, however, subject to the defense of laches. In determining whether appellants' claims are barred by laches, the arbitrator should take into account all those factors listed in Section IV(C)(4)(b) of this opinion.

In sum, the court indicated a predisposition to maintain the jobs of employees of a bankrupt company through the dovetailing of rosters. *Id.* 1268. Since the court lacked jurisdiction to impose that settlement, the court created a remedy to give the former Rock Island employees a second bite of the apple. This relief—arbitration—was granted to all of the complainants, even though the non-UTU represented employees were not the subjects of the award of Arbitration Board No. 406, nor were they proven by evidence to have been the victims of unfair representation.[3]

(Continued from previous page)

F.2d 1266. For purposes of craft representation and negotiation of agreements, BLE, the craft representative for the craft of locomotive engineers, has exclusive jurisdiction. *See Virginian Ry. Co. v. System Federation,* 300 U.S. 515 (1937).

[3] The record establishes the converse: The CNW-BLE February 16, 1982 agreement was negotiated at the outset by

(Continued on following page)

REASONS FOR GRANTING THE WRIT

THIS CASE MERITS REVIEW BY THIS COURT DUE TO THE CONFLICT OF THE DECISION BELOW WITH THE RATIONALE OF THIS COURT'S DECISIONS AND THE DISTINCTIVE ISSUE POSED BY THE GRANT OF THE COURT OF APPEALS OF A REMEDY FOLLOWING ITS DETERMINATION THAT THE CLAIMS WERE JURISDICTIONALLY BARRED.

A.

In *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court confronted the issue of which statute of limitations governs hybrid contract/unfair representation claims and held that the six-month limitations period contained in section 10(b) of the National Labor Relations Act, ("NLRA") 29 U.S.C. § 160(b)

(Continued from previous page)

E. C. Minninger, who had been the BLE General Chairman for the Rock Island. (J.A. 1065). Minninger later gave his "power of attorney" to act for him in the negotiations to R. E. Delaney, a BLE International Vice President and later its President, and Delaney participated in all subsequent negotiations representing the former Rock Island employees. (J.A. 1497-98). As admitted by the plaintiffs, both Minninger and Delaney signed the agreement. Minninger was paid by the International BLE during this period as a Rock Island Special Representative. (J.A. 1065, 1330, 1463).

The action of the court of appeals deprived petitioner of an opportunity to dispute the facts material to that claim. As this Court stated in *Fountain v. Filson*, 336 U.S. 681, 683 (1949):

> When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to the claim by ordering summary judgment against her.

applies to both the claims for breach of the collective bargaining agreement and for breach of the duty of fair representation due to the similarity of the rights asserted in that case and the policies supporting the six-month period to those rights covered under section 10(b). In so ruling, the Court emphasized that the dual policies fostered by the six-month period are promotion of stable collective bargaining relationships through uniform application of the agreement and rapid, final resolution of labor disputes. *Id.*, at *171*, quoting from *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J., concurring). The six-month limitation period was extended to unfair representation claims under the Railway Labor Act ("RLA") in *West v. Conrail*, 481 U.S. —, 109 S. Ct. —, 95 L. Ed. 2d 32 (1987) where the Court found that fair representation claims under both the NLRA and RLA should be treated the same in determining that the six-month limitations period is satisfied by filing the action, rather than by service of process.

The courts of appeals uniformly had adopted the *Del Costello* limitations period for RLA unfair representation claims prior to *West v. Conrail, supra. Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Sisco v. Consolidated Rail Corp.*, 732 F.2d 118 (3d Cir. 1984); *Triplett v. Local 308, Brotherhood of Railway and Airline Clerks*, 801 F.2d 700 (4th Cir. 1986); *Brock v. Republic Airlines, Inc.*, 776 F.2d 523 (5th Cir. 1985); *Ranieri v. United Transportation Union*, 743 F.2d 598, 600-601 (7th Cir. 1984); *Hunt v. Missouri Pacific R.R. Co.*, 729 F.2d 579, 581 (8th Cir. 1984); *International Ass'n of Machinists v. Aloha Airlines*, 781 F.2d 1400 (9th Cir. 1986); *Barnett v. United Air Lines, Inc.*,

738 F.2d 358, 363-64 (10th Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984).

Moreover, the six-month period specified in section 10(b) of the NLRA has been applied to unfair representation in bargaining negotiations and the execution of contracts. In *United Independent Flight Officers v. United Air Lines, Inc.*, 756 F.2d 1262 (7th Cir. 1985), the Seventh Circuit applied the six-month statute to claims against an air carrier and union in negotiating a benefit plan. Subsequently, in *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914 (7th Cir. 1985), the Seventh Circuit extended the *Del Costello* period to an alleged violation of section 2, First of the RLA based upon the rail carrier's refusal to bargain collectively. The Ninth Circuit, in *International Ass'n of Machinists v. Aloha Airlines*, 790 F.2d 727 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 400 (1986), also applied the six-month period to fair representation actions involving collective bargaining negotiations and the breach of the status quo provisions of the RLA during those negotiations. And in *Robinson v. Pan American World Airways, Inc.*, 777 F.2d 84 (2d Cir. 1985), the Second Circuit borrowed the section 10(b) period in a suit alleging wrongful discharge for pro-union activities, brought under section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth.

In addition, the *Del Costello* period has been found to bar various statutory claims that bear a family resemblance to unfair labor practices, such as sections 101 and 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411 and 412. *Reed v. United Transportation Union*, 828 F.2d 1066 (4th Cir. 1987), *cert. granted*,

99 L. Ed. 2d 267 (1988); *Local 1397, United Steelworkers v. United Steelworkers,* 748 F.2d 180 (3d Cir. 1984).

In each instance, the section 10(b) limitations period was applied on the basis of the policy considerations set forth in this Court's opinion in *Del Costello*—the prompt resolution of disputes that may affect the bargaining relationship between the union and the employer. In *Local 1397, United Steelworkers v. United Steelworkers, supra,* 748 F.2d at 182, the court said: "In both situations [an unfair labor practice under the NLRA and a hybrid section 301 action], the federal labor policy in promoting stable bargaining relationships necessitates prompt resolution of disputes between an individual and his union or an individual and his employer, disputes that may affect the bargaining relationship between union and employer." Even where the disputes are internal union ones, the court perceived that rapid resolution "is necessary to maintain the federal zone of stable bargaining relationships, for dissension within a union nationally affects the union's activities and effectiveness in the collective bargaining arena." *Id.,* at 183-84 (Cited with approval in *Reed v. United Transportation Union, supra,* 828 F.2d at 1069).

While giving lip service to these concepts in affirming the decision of the trial court, the Eighth Circuit then turned these principles upon their head by deciding that though the federal courts lacked jurisdiction, it had the power to direct the former Rock Island locomotive engineers to another forum—arbitration—to determine whether their rights vis-a-vis BLE, and the CNW locomotive engineers, had been properly protected through the negotiation of the February 16, 1982 seniority implementing

agreement. Since the first complaint was filed in November of 1983, 21 months after execution of the BLE-CNW implementing agreement, the decision setting aside the agreement, which was entered six years later, does not aid in stabilizing collective bargaining, nor does it promote relatively rapid, final resolution of labor disputes under the RLA.[4]

Also, since the award of Arbitration Board No. 406, which was set aside by the lower court, did not pertain to BLE or to former Rock Island engine service employees, the Eighth Circuit improperly used that decision to extend the limitations period for those former Rock Island engine service employees suing BLE, thereby defeating the "finality of private settlement[ ]" between the BLE and CNW through the seniority arrangements reached on February 16, 1982 and in place throughout the entire 21 month period prior to suit.

Any change at this time would disrupt the seniority relationships enjoyed by CNW and former Rock Island locomotive engineers. Any change now could create dissatisfaction, promote dissension, cause protracted internal disputes, serve to weaken the union (particularly where an arbitration award involving another union was used against it), and be destabilizing to labor-management relations.

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[4] In fact, the January 8, 1988 opinion has had the opposite effect and was followed by complaints lodged, for instance, in *Allen v. United Transportation Union*, Civil Action No. 88-0675-C-3 (United States District Court for the Eastern District of Missouri); *Alcorn v. Burlington Northern Transportation Company*, Case No. 88-2412NE (appeal pending, 8th Cir.).

B.

The Court below also disregarded this Court's opinion in *Lodge 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960) (*"Bryan Manufacturing"*). That case involved a complaint alleging that the union lacked majority status at the time it entered into a union security agreement and, therefore, the agreement was unlawfully executed and accordingly unenforceable. This Court held that any unfair labor practice charge seeking to prevent enforcement of the agreement was barred by the statute of limitations, since under section 10(b) the enforcement of the collective bargaining agreement constituted a suable unfair labor practice for six months following the making of the agreement. In *Bryan Manufacturing,* the Court noted that Congress thought that a six-month suability period from the execution of the agreement promoted the policy of industrial peace and stable collective bargaining agreements.

As noted previously, in *United Independent Flight Officers v. United Air Lines, Inc.*, 756 F.2d 1262 (7th Cir. 1985), the Seventh Circuit applied the section 10(b) period to claims of violations by the employer and union of the RLA and the Employment Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*, alleged to have arisen from their negotiating and executing a pension benefit plan agreement. Based upon its reading of *Bryan Manufacturing,* the Seventh Circuit stated in finding the action barred (*id,* 1273):

> Causes of action based on entry into collective bargaining agreements accrue, and section 10(b) starts to run, when the contract is signed. *Local Lodge*

> *No. 1424, International Association of Machinists v. NLRB*, 362 U.S. 411 (1960) (Bryan Manufacturing) (NLRB unfair labor practice action). Bryan Manufacturing governs the application of section 10(b) to employee DRF actions against unions. *Metz*, 715 F.2d at 305-06. Since the Supplemental Agreement was signed on June 24, 1982, but suit was not brought until February 2, 1983—more than six-months later—UIFO's DFR claim against ALPA is barred by section 10(b). Consequently, the action against United as a party to UIFO's breach of its DFR is also barred. [Citation omitted].

See also Chrysler Workers Ass'n v. Chrysler Corp., 663 F. Supp. 1150 (N.D. Ohio 1986) (six-month limitations period applied to claim which alleged former employer, successor employer and union breached labor contracts and union's duty of fair representation and also misrepresented the extinction of right to return to home plants, and that period started from date of national and local agreement failing to renew letters of understanding concerning return rights).

Although the Eighth Circuit purportedly applied the *Del Costello* period, it nevertheless set aside the BLE-CNW February 16, 1982 implementing agreement as conflicting with the March 4th Agreement. Based upon *Bryan Manufacturing*, however, any claim to prevent enforcement of the implementing agreement had to be filed within six months following the making of the agreement. The alleged claims of the former Rock Island employees "implicate[d] the consensual processes which labor law was designed to promote" and "raise[d] questions regarding the appropriate terms and conditions to be maintained." The purpose of the six-month limitations period is to pro-

vide stability to the collective bargaining agreement and to resolve, rapidly and finally, the terms and conditions to be applied. *See International Ass'n of Machinists v. Aloha Airlines*, 790 F.2d 727, 734 (9th Cir. 1986).

The action of the Eighth Circuit in granting a remedy where none exists contravenes the purposes to be attained by the section 10(b) period. By setting aside the seniority implementing agreement, the court below improperly interjected itself into the bargaining process, destroying the consensual processes between the craft representative and the rail carrier, and breathed life into an issue that had been laid to rest for over a year and one-half preceding the filing of the suit in the district court. Though the panel may have desired a different resolution of the seniority adjustments, whereby the former Rock Island employees possibly would have had all of the jobs on any line of the bankrupt carrier acquired by the CNW, this did not constitute an adequate legal basis to give the former Rock Island employees a second bite of the apple. Those employees had six months from the entry into the implementing agreement in which to attack its enforcement. They did not do so for 21 months and accepted its benefits during that period. Any relief they may now have should be limited to section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, through which they may invoke the political process in an attempt to elect a craft representative that may be willing to modify the existing seniority arrangements.

C.

This Court asserted in *Wood v. Carpenter*, 101 U.S. 135, 139 (Otto), 25 L. Ed. 807 (1879):

> Statutes of limitations are vital to the welfare of society and are favored in the law. They are found

> and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation.

Thus, in our jurisdictional system of jurisprudence, exceeding the limitations period is an insuperable bar to relief. *See Guy v. Swift & Co.*, 612 F.2d 383, 385 (8th Cir. 1980). Very simply, the statute of limitations is jurisdictional in the sense that a federal question which becomes "devoid of merit will not sustain jurisdiction." *See Dixon v. Martin*, 260 F.2d 809, 811 (5th Cir. 1958); *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983) (the failure to timely bring suit under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*, may be considered at trial even though not pleaded, because the limitations period "not only bars the claimant's remedy, but it also destroys the employer's "liability").

Once a court finds that it no longer has jurisdiction, as did the lower court (850 F.2d at 1266), it no longer has power to grant relief. That court also locks discretion to consider the merits of the case. This Court has rejected the contention that under certain procedural conditions, a court may make jurisdictional decisions to have prospective effect only and thereby allow itself to decide the merits of a case over which it was without jurisdiction. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). The Court said in terms applicable to the situation at bar:

> A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to

> hear the appeal, it was without authority to decide the merits.
>
> *Id.*, at 379.

This concept that the authority of the courts is dependent upon jurisdiction has been confirmed in various contexts. It is for this reason that lack of jurisdiction can be raised at any time, even following trial on the merits. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951) (diversity jurisdiction). In fact, even if a defendant fails to raise want of diversity until after the limitations period has run, a court could not adjudicate, on the theory of hardship, a case over which it had no jurisdiction. *See, e.g., Basso v. Utah Power & Light Co.*, 495 F.2d 906, 910 & n. 1 (10th Cir. 1974); *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094 (E.D. Pa. 1968).

In *United States for Use of Celanese Coatings Co. v. Gullard*, 504 F.2d 466 (9th Cir. 1974), preliminary summary judgment was granted the plaintiff in a case under the Miller Act, 40 U.S.C. §§ 270a-270c. The defendant then realized that the action may not have been brought within the applicable one-year limitations period and moved for reconsideration. The trial court denied the motion on the ground of res judicata. The Court of Appeals reversed, however, on the basis that the statute of limitations "being jurisdictional," it could be raised at any time. *Id.*, 469.

In the instant case, the Eighth Circuit did not have any jurisdiction over the case insofar as the claims of the former Rock Island locomotive engineers against petitioner BLE. Even though the lower court may have con-

sidered that the running of the statute of limitations may have worked a hardship on those plaintiffs who were not privy to the arbitration award involving UTU and CNW, this belief did not warrant it to adjudicate those claims over which it had no jurisdiction. *See, e.g., Torres v. Oakland Scavenger Company,* 487 U.S. —, 108 S.Ct. —, 101 L. Ed. 2d 285 (1988), which held that a secretarial error in failing to list the names of all appellants deprived an appellate court of jurisdiction over the unnamed parties, even though the ruling caused a harsh result.

The court below disregarded or refused to follow these simple tenets, notwithstanding that this Court has stressed that statutes of limitations and other jurisdictional grounds are favored and must be strictly applied. We submit that the error committed is a significant one. It raises a critical issue as to the functions of the appellate courts and their authority to go outside their domain of deciding cases and instead substituting their judgments for those of labor and management. This case provides a solid vehicle to address that issue.

———o———

CONCLUSION

Based upon the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ross & Kraushaar Co., L.P.A.
Harold A. Ross
(Counsel of Record)
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorneys for Petitioner Brotherhood of Locomotive Engineers

No. 88-.....

In The

Supreme Court of the United States

October Term, 1988

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioner,

v.

VANE NEWTON, ROBERT B. BAILEY, WAYNE A. MOORE, ROBERT L. DUNCAN, HAROLD E. JOHNSON, H. L. KIDD, JR., DONALD L. KIDD, JR., B. J. RUDE, MAX A. EADS, MILTON E. CAPPS, WILBUR STANTON, J. W. BURKE, JR., E. D. SYNDER, DANIEL V. MIDDOUR, STEPHEN R. EARLY, LEO T. SEEHAN, RICHARD A. NITCHER, JOHN E. BEGHTOL, JAMES F. RAMSEY, JOHN E. REECE, DALE MARTIN KEITH, JOHN R. STONE, DONALD D. BUHMANN, HOWARD A. TUTTLE, OSCAR D. OVERTON, W. R. URTON, ROBERT W. LUTH, MARK R. POMEROY, DAVID G. DICKEY, TERRY B. TURVOLD, CLYDE R. THOMAS, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, and UNITED TRANSPORTATION UNION,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDIX

	Page
Substituted Opinion of the Court of Appeals for the Eighth in *Beardsley v. Chicago and North Western Transportation Company*, 850 F.2d 1255	1a
Original Opinion of the Court of Appeals for the Eighth Circuit in *Beardsley v. Chicago and North Western Transportation Company*, 836 F.2d 1493	50a
Order of the Court of Appeals for the Eighth Circuit Denying Petitions for Rehearing and Hearing En Banc (September 14, 1988)	92a
Opinion of the District Court for the Southern District of Iowa in *John E. Reece v. Chicago and North Western Transportation Company* (filed April 16, 1985)	93a
Opinion of the District Court for the Southern District of Iowa in *Vane Newton v. Chicago and North Western Transportation Company* (filed April 16, 1985)	103a
Rulings and Order of the District Court for the Southern District of Iowa in *Vane Newton v. Chicago and North Western Transportation Company etc.*, (filed February 19, 1986)	114a
Judgment of the District Court in *Vane Newton v. Chicago and North Western Transportation Company, etc.* (filed February 19, 1986)	122a
Nunc Pro Tunc Order entered by the District Court in *Angeline V. Boll v. Chicago and North Western Transportation Company* (filed April 29, 1986)	126a
Statutes Involved	128a

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1369,

L. Lee Beardsly,
Appellant,
v.
Chicago & North Western Transportation Co., et al.,
Appellees.

* * * *

Francis E. Amoit,
Appellant,
v.
Chicago & North Western Transportation Co., et al.,
Appellees.

Appeal From The United States District Court for the Southern District of Iowa.

No. 86-1370

John E. Reece, et al.,
Appellants,
v.
Chicago & North Western Transportation Co., et al.,
Appellees.

No. 86-1372

Jack L. Chambers, et al.,

Appellants,

v.

Chicago & North Western Transportation Co., et al.,

Appellees.

No. 86-1373

Roger L. Swift; Oscar D. Overton; W. R. Urton; Robert W. Luth; Mark R. Pomery; David G. Dickey; Terry B. Turvold and Clyde R. Thomas,

Appellants,

v.

Chicago and North Western Transportation Company; United Transportation Union, an unincorporated labor organization; and The Brotherhood of Locomotive Engineers, an unincorporated labor organization,

Appellees.

No. 86-1374

Harold L. King; James L. Knox; Steven Arthur Newton; George R. Etherton; Larry L. Williams; John F. Keith; and Joseph A. Rush,

Appellants,

v.

Chicago and North Western Transportation Company and The United Transportation Union, an unincorporated labor organization,

Appellees.

No. 86-1950

Vane Newton; Robert R. Bailey; Wayne A. Moore; Robert L. Duncan; Harold E. Johnson; Donald L. Kidd, Sr.; H. L. Kidd, Jr.; B. J. Rude; Max A. Eads; Jack E. Brown; Milton E. Capps; Wilbur Stanton; J. W. Burke, Jr.; E. D. Snyder; Daniel V. Middour; Donald P. McCaleb; Sam H. Dean; Donald E. Bisgaard; Robert W. Shaner; LaDon E. Crane; Roger L. Rothamel; Arnold M. Scheel; Frank M. Ramey; A. M. McQuade; Lloyd G. Andrews; Richard D.

Thorsland; John R. Vincent; Stephen R. Early; Leo T. Seehan; and Richard A. Nitcher; John E. Beghtol; Dennis E. Chaplin; Paul W. Strawn; Max R. Williams; David Yackle; Francis E. Amiot; James F. Ramsey; Allan P. Sherling; Jerry E. Payne; Richard A. Clark; Kenneth W. Brevig; Stephen D. Rosentangle and William H. Rosentangle,

Appellants,

v.

Chicago and Northwestern Transportation Company; United Transportation Union, an Unincorporated Labor Organization; and Brotherhood of Locomotive Engineers and (sic) Unincorporated Labor Organization,

Appellees.

No. 87-1325

Angeline V. Boll, Robert J. Tollakson and Dennis L. Stowe,

Appellants,

v.

Chicago and North Western Transportation Company, and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, an unincorporated labor organization,

Appellees.

Submitted: August 31, 1987

Filed: June 15, 1988

Before HEANEY, BOWMAN and WOLLMAN, Circuit Judges.

HEANEY, Circuit Judge.

I. OVERVIEW

One hundred fifty-eight former employees of the Chicago, Rock Island and Pacific Railroad (Rock Island or Rock Island Railroad) appeal from decisions of the United States District Court for the Southern District of Iowa dismissing or denying their claims against the Chicago & Northwestern Transportation Co. (CNW) and four railroad labor organizations.[1] The suits allege violations of a labor protective agreement and a United States statute,

---

[1]The United Transportation Union, the Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

both designed to protect the job status of the former Rock Island employees.

We affirm the district court insofar as it dismissed several of the actions for lack of jurisdiction. We reverse the district court's denial of appellant's request to vacate an arbitration decision between the CNW and the United Transportation Union (UTU) regarding former Rock Island ground service employees. We find that the terms of the October 22, 1980 seniority implementing agreement as affirmed by the arbitrator are invalid and direct that they be renegotiated. Finally, we hold the remaining employees have a right to arbitration, subject to the right of the CNW and the appellee unions to assert the defense of laches.

II. FACTUAL BACKGROUND

A. Attempted Reorganization, Interim Operation and Purchase of the Rock Island Railroad

In 1975, the Rock Island Railroad commenced reorganization proceedings. These efforts were unsuccessful. In September of 1979, the Interstate Commerce Commission (ICC) concluded that Rock Island had insufficient cash assets to continue its operations "in the face of national transportation requirements." On March 18, 1980, the ICC granted the CNW authority to conduct temporary operations over certain Rock Island lines from March 24

until May 31, 1980.[2] The ICC subsequently authorized the CNW to continue providing interim service over those lines until June 20, 1983, at which time a United States Bankruptcy Court approved the sale by the Rock Island trustee to the CNW of the lines upon which it had been conducting interim service.

B. The March 4th Agreement

On March 4, 1980, thirteen railroads who were operating or contemplating operations on Rock Island lines, including the CNW, entered into a labor protective agreement[3] with national representatives of rail labor organizations, including the national representatives of appellee unions involved in the present action.

The March 4th Agreement was designed to ease a potentially troublesome transition. The acquiring railroad agreed to make accommodations in terms of providing rights of first hire and seniority to the employees of the acquired company. In exchange, the international unions agreed to assure labor peace during the transition. Specifically, the stated purpose of this agreement was to provide:

---

[2]During this period, several other railroads were also given authority to conduct operations over other parts of the former Rock Island lines. *See Kansas City Terminal Ry. Co.—Directed to Operate Over—Chicago, R.I. & P. R.R. Co., Debtor,* 360 I.C.C. 289, 290 (1979).

[3]This agreement, entitled Labor Protective Agreement between Railroad Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating through the Railway Labor Executives' Association, is reproduced in 1 Joint Appendix 131.

> a fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner, as set forth herein, immediately upon authorization for such operation.

March 4th Agreement at 1.

Article II of the Agreement provides that the purchasing carrier shall determine by craft its necessary additional manpower requirements "due to its taking over . . . [the] Rock Island lines." *Id.* at 3. The acquiring carrier further agreed to provide a detailed explanation of these needs, to "discuss" its requirements with representatives of the crafts employed by both the acquiring and acquired railroad, and to extend to employees of the acquired railroad the right of first hire in all work stemming from the acquisition. *Id.* This right of first hire was to accrue to employees in order of their seniority.[4]

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[4]Specifically, Article II of the March 4th Agreement provides:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over [the] Rock Island [line]. * * * Each of the determinations shall be discussed with representatives of the crafts on purchasing carrier and on the Rock Island * * * with detailed explanations to them of the basis for each determination prior to serving notice under paragraph 4 hereof.
>
> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island * * * the first right of hire * * * dependent on whose trackage is involved and consistent with the purpose of Section 8 of the Milwaukee Railroad Restructuring Act. * * * In carrying out the purposes of this section, the purchasing carriers shall first utilize existing seniority rosters applicable to the appropriate craft and seniority district of the lines and territories involved in fulfilling employment needs in connection therewith.

Article II, section 9, of the Agreement sets forth procedures to determine job seniority for former Rock Island employees hired by the CNW. It states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

C. The Rock Island Railroad Transition and Employee Assistance Act—RITEA

On May 30, 1980, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act (RITEA) Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified as amended at 45 U.S.C. § 1001). The purpose of this act was twofold: (1) to protect the interests of former Rock Island employees and (2) to protect the railroads against labor strife and ensure continued operation of the lines formerly controlled by the Rock Island railroad.[5]

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[5]Under the "Congressional Findings" section, the Act states:

> (1) uninterrupted continuation of service over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
>
> (2) for those Rock Island Employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
>
> (3) a cessation of necessary operations of the Rock Island would have serious repercussions on the economies of the States in which such railroad principally operates; and

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Section 105 of the Act, 45 U.S.C. § 1004, entitled "Railroad Hiring," provides a broader right of first hire than the March 4th Agreement. Where the March 4th Agreement limits the right of first hire to work stemming from the acquisition of the Rock Island, RITEA provides a blanket right of first hire to former Rock Island employees.[6] Specifically, it states that former employees of the Rock Island:

> shall, unless found to be less qualified than other applicants, *have the first right of hire by any other rail*

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(4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of vital commuter service.

RITEA § 102, 45 U.S.C. § 1001.

[6]The House conference report accompanying RITEA describes the purpose of Section 105 in the following terms:

SECTION 105—RAILROAD HIRING

Senate Bill.—Section 105 of the Senate bill is based on a similar provision in the Milwaukee Railroad Restructuring Act. *It provides for priority hiring of Rock Island employees unless they are found less qualified than other applicants* or unless such priority hiring would interfere with a carrier's equal opportunity employment obligations.

House Amendment.—The House amendment . . . is also patterned after the Milwaukee Railroad Restructuring Act. It specifically states that rights afforded to Rock Island employees under this section shall be coequal to rights afforded Milwaukee employees.

Conference Substitute.— * * * In general, this section is intended to insure that eligible Rock Island employees will be hired without delay or discrimination. The successful implementation of this provision depends upon the full cooperation of other carriers.

H.R. Conf. Rep. No. 96-1041, 96th Cong., 2d Sess. 25 (1980) (emphasis added).

> *carrier that is subject to regulation by the [ICC] for any vacancy* that is not covered by [an affirmative action plan].

45 U.S.C. § 1004 (emphasis added).

On January 14, 1983, the arbitration provision of the Regional Rail Reorganization Act, 45 U.S.C. § 797(c)(g), was amended to subject disputes regarding the right of first hire under RITEA to mandatory arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2543, 2547 (1983). Prior to this time, an action could theoretically be brought in federal court to enforce this right. *See Brotherhood of Locomotive Engineers v. Burlington Northern,* 580 F. Supp. 797 (D. Colo. 1984).

A. Propriety of Implementing Agreements Negotiated Under the March 4th Labor Protective Agreement

1. Factual Background

To understand appellants' claims concerning the validity of the implementing agreements negotiated under the authority of the March 4th labor protective agreement, it is important to take note of certain circumstances surrounding the negotiation of these agreements. Specifically, the effect of the closing and consolidation of local unions must be understood, as well as obligations imposed on the negotiating unions by their own constitutions.

a. National Unions Close Down Local Rock Island Locals

Shortly after the March 4th Agreement and RITEA went into effect, the international unions here involved

closed down or consolidated many of the locals serving former Rock Island employees. They maintain these closings or consolidations were an economic necessity because members had ceased paying dues. *See* Affidavit of Robert L. Hart, 5 Joint Appendix 1057, 1057-58. The appellants maintain that the closing or consolidation of the locals resulted from a conspiracy among the international unions, the CNW, and the local unions representing CNW employees to undermine the bargaining strength of the former Rock Island employees. *See generally,* 1 Joint Appendix 16-130. As evidence of this, they note that local union officials were unavailable to file grievances and that representatives of the internationals engaged in a pattern of falsely assuring former Rock Island employees that action would be taken on grievances. *Id.* Further, appellants maintain that in the confusion and consolidation, they were not informed of the safeguards, such as the March 4th Agreement and RITEA, enacted to assure their job-related rights. *Id.* Whatever the reasons for the closings or consolidations, they clearly made it more difficult for the former Rock Island employees to understand their rights and to determine whether they were being adequately protected by their internationals.

b. The United Transportation Union Constitution

Article 85 of the United Transportation Union (UTU) Constitution[7] provides that the General Chairman empow-

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[7]Article 85 of the UTU Constitution provides in relevant part:

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ered to make a "systems" agreement, such as the implementing agreements involved in the present dispute, must poll the "affected Local Chairmen", i.e. the Chairmen for the CNW employees and the Rock Island employees, prior to signing such an agreement and be governed by the majority of votes cast. Moreover, in negotiating such agreements, the seniority of employees of acquired railroads is to be preserved to "the extent possible".[8] In addition, Article 90 mandates that all intra-union disputes surrounding an acquisition or merger be resolved internally by the union. This ensures that a unified position can be established with respect to these disputed issues and preserves

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> The General Chairman must poll the entire General Committee prior to signing any system agreements and be governed by the majority of the votes cast. The General Chairman must poll the affected Local Chairmen prior to signing any local agreements and be governed by the majority of the votes cast.

See Joint Appendix 315, 347 (emphasis omitted).

[8]Article 90 of the UTU Constitution provides in relevant part:

> When, through lease, purchase, merger, consolidation or other cause, a line or lines of a carrier or a portion thereof is taken over by another carrier or where, because of establishment of a new line by an existing carrier or for other reasons traffic is permanently diverted from one carrier to another or from one road and/or yard seniority district to another on the same carrier and such affects the seniority rights of employees on such carriers, General Committees of Adjustment shall arrange for a fair and equitable division of the work. *Prior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible.*

See Joint Appendix 315, 348-49 (emphasis added).

internal union authority over the interpretation of its constitution.[9]

2. Negotiation of the Implementing Agreements

Pursuant to Article II of the March 4th Agreement, the CNW sought to conclude implementing agreements with respect to the relative seniority rights of its employees and the former employees of the Rock Island Railroad it had hired. Although the CNW did involve the union representatives of the former Rock Island employees in preliminary discussions, these representatives were not present when the final agreements were reached, were not parties to these agreements, and had virtually no control over the terms of these agreements.

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[9]Article 90 continues:

> Disputes arising under this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President. The International President shall promptly assign an officer to assist the General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and recommendation to the International President who, in turn, shall decide the dispute.
>
> Any local or member of a local affected by an action or decision of a Chairman, Sub General Committee or General Committee, or by the decision of the International President with respect to the Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the action or decision. The Chairman, Sub General Committee, General Committee, or International President, as the case may be, shall be allowed thirty (30) days from the date the appeal is filed in which to reply to the appeal. The parties involved in an appeal shall exchange copies of the appeal and reply to the appeal.

Final implementing agreements with engine service employees represented by the the Brotherhood of Locomotive Engineers (BLE) and the UTU were signed by the CNW General Chairmen for the BLE and the UTU on February 16, 1982. *See* 7 Joint Appendix 1399.

On October 22, 1980, the CNW and two UTU General Chairmen of the Committee of Adjustment for the CNW—G. R. Maloney and Thomas Q. Ryan—signed an interim agreement. This agreement determined the relative seniority rights of former Rock Island employees and employees of the CNW in terms of ground service work.

3. Arbitration of UTU Rock Island Ground Service Employees

a. The Arbitration Proceeding

On April 15, 1981, the General Chairman of the Committee of Adjustment for UTU Rock Island, Ralph Tambaro, sent a letter to the CNW objecting to the October 22, 1980 interim implementing agreement insofar as it related to ground service employees. *See* 7 Joint Appendix 1437. He objected, in part, because the agreement had been reached without the participation of the union representatives of former Rock Island employees and, in part, because it failed to give Rock Island employees seniority rights to which they felt entitled under the March 4th Agreement. Tambaro demanded arbitration pursuant to Article II, section 9(b) of the March 4th Agreement. On May 4, 1981, the CNW received a second letter from Fred Hardin, the International President of the UTU, seeking to invoke the same arbitration procedure on behalf of former Rock Island ground service employees. On May

18, 1981, Hardin by letter indicated that R.M. Crago, UTU International Vice President, would represent the UTU's Rock Island employees in the arbitration, but would not act as a representative of the international union.

Next, the CNW and CNW-UTU filed suit to stop this arbitration and succeeded in delaying it or approximately one and one-half years. *See Chicago and Northwestern Transportation Co. v. United Transportation Union,* C.A. 81-2472 (D.D.C.); *see also* Supplemental Affidavit of Robert W. Schmiege, 7 Joint Appendix at 1496. Thereafter, the arbitration went forward. The CNW and representatives of the Rock Island and the CNW ground service employees participated in the arbitration, which was conducted between February 23 and 25, 1983, by a neutral arbitrator appointed by the National Mediation Board. *See* Arbitration Board No. 406, *Matter of Arbitration Between the Chicago and Northwestern Transportation Company and The United Transportation Union,* at 2 (May 20, 1983) (Arbitration) (*see* 2 Joint Appendix 267). Although the UTU constitution required the union to enter the arbitration with a unified position, the arbitration consisted of a contest between the Rock Island UTU representatives and the CNW-UTU representatives, with the international union playing no significant independent or authoritative role.

b. The Tucumcari Case

Shortly after the matter was submitted to arbitration, but several months before the arbitrator rendered a decision, a relevant internal dispute was being resolved within the UTU. In UTU Board of Appeals Case No. 64, File 8-8-54 (March 11, 1983) (*Tucumcari*) (*see* 2 Joint Appen-

dix 441), former employees of the Rock Island challenged an implementing agreement quite similar to those involved in the case before us.

In *Tucumcari,* a segment of the former Rock Island railroad called the Tucumcari line had been purchased after a period of interim operation by the St. Louis Southwestern Railroad (SSW) on March 24, 1980. Pursuant to the terms of the March 4th Agreement, a subsequent implementing agreement was reached purporting to establish a seniority scheme for the former Rock Island employees.

The implementing agreement was signed by General Chairman R. H. Arnett, on February 23, 1982. Arnett was the representative of the SSW-UTU, the acquiring company's union, and had never represented Rock Island employees. As in the present case, the agreement gave former Rock Island employees seniority dates as of their first day of work for the SSW.

Two former Rock Island employees, J. W. Volkman and J. T. Kelso, brought an internal appeal within the UTU. They alleged that the implementing agreement was contrary to the terms of the March 4th Agreement. They argued, *inter alia,* that the agreement was improper because Arnett represented only employees of the acquiring company and not the Rock Island employees. They also maintained that the March 4th Agreement contemplated greater seniority rights than were provided by the February 23, 1982 implementing agreement.

The Board of Appeals held for Volkman and Kelso and, in reforming the terms of implementing agreement, stated that "all employee representatives" should partici-

pate in the negotiation of implementing agreements. *Id.* at 16. Second, the Board found that the former Rock Island employees were entitled to a seniority date as of the day they were hired by the Rock Island. Specifically, the Board stated:

> In this case of acquisition, prior rights are of paramount concern. To place a termination date on those prior rights would not only be a travesty of justice but also would contravene the very concepts of seniority and prior rights.

Id. at 18. The Board continued:

> This Board also finds the former employees should be given the seniority dates of their earliest employment date, i.e., the seniority date carried on the Rock Island. Without extensive elaboration, we feel this would not be too hard to accomplish.

Id.

c. The Arbitrator's Decision

The arbitrator issued his award in the ground service employees' dispute on May 20, 1983. Without notice of the UTU's centrally announced position in *Tucumcari* and without reference to the UTU Constitution, the arbitrator declared that the October 22, 1980 implementing agreement met the requirements of the March 4th Agreement. Moreover, at the arbitration, the Rock Island employees contended they were inadequately represented, under the terms of the March 4th Agreement, in the negotiation of the implementing agreements. The arbitrator simply deferred to the position of the acquiring union. In his analysis of this claim, the arbitrator characterized this very serious situation as merely "unfortunate." Specifically he stated:

> Full opportunity was given to all representatives of these employees to further discuss this matter with the Carrier in order to reach an implementing agreement. Unfortunately, with respect to the crafts here involved only the C&NW—UTU representative reached an understanding with the Carrier. This does not mean, however, that the UTU representatives of former Rock Island employees were not afforded the fullest opportunity to make their case with respect to the allocation of additional manpower.

Arbitration at 4.

Thus, the arbitrator inexplicably appeared to believe, because the Rock Island employees could "talk" to the carrier, that agents of the acquiring unions could properly and adequately represent the former Rock Island employees in the seniority negotiations. In doing so, he never noted that the agents of the acquiring unions represented constituencies with absolutely adverse interests.

Finally, in contravention of the intent of the March 4th Agreement, the UTU Constitution, and *Tucumcari,* the arbitrator declared that any notion of prior rights of dovetailing of seniority would be improper and that employees of bankrupt railroads were only entitled to limited relief. He therefore affirmed, with a few insignificant modifications, the terms of the October 22, 1980, implementing agreement.

Having set forth the factual background of the present dispute, we turn to resolving the specific legal claims of the parties.

III. JURISDICTIONAL ARGUMENTS COMMON TO ALL APPELLANTS

A. Overview

All appellants in this action assert violations of the March 4th Agreement and RITEA. With one exception, they sought redress for their grievances in federal court without first resorting to arbitration. Appellants outline several legal theories in support of federal court jurisdiction. Each is unavailing.

B. Section 105 of RITEA Does Not Create a Right of Action in Federal Court

First, the former Rock Island employees claim that Section 105 of RITEA, 45 U.S.C. § 1004, adopted May 30, 1980, creates a right of action in federal court. Section 105 states:

> (a) Each person who is an employee of the Rock Island Railroad on August 1, 1979, and who, prior to January 1, 1981, is separated or furloughed (other than for cause) from his employment with such railroad * * * as a result of a reduction of service by such railroad * * * shall, unless found to be less qualified than other applicants, have the first right of hire by any other rail carrier that is subject to regulation by the Commission for any vacancy [not covered by an affirmative action plan].

On January 13, 1983, 45 U.S.C. § 797(c)(g) was amended to subject this right to arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2545, 2547 (1982). The amended statute provided:

> Any dispute, grievance or claim arising under * * * section 1004 of this title (45 U.S.C. sec. 1004)

shall be subject to resolution in accordance with the following procedures:

(1) Any employee with such a dispute, grievance, or claim may petition the [The Railroad Retirement] Board to review and investigate the dispute, grievance, or claim.

(2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under * * * section 1004 of this title may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(3) In the case of any violation of * * * section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

45 U.S.C. § 797(c)(g) (emphasis added).

Based on the foregoing, the appellants claim that the language "shall be subject to" is permissive rather than mandatory. We agree fully with the district court and find that the language of 45 U.S.C. § 797(c)(g) is clearly mandatory and that appellants' arguments in this regard are frivolous.

C. The Rock Island Employees Do Not Have a Vested Right to an Action in Federal Court

The appellants also contend that during the interim period between the date RITEA became law on May 30, 1980, and the date the right of first hire became subject to arbitration on August 13, 1983, the Rock Island employees had a vested right to bring an action in federal

district court under 28 U.S.C. § 1331 that could not be eliminated by a later amendment of the law. We disagree.

The Supreme Court has clearly stated:

> [W]hen the jurisdiction of a cause depends upon a statute the repeal of the statute takes away jurisdiction. And it is equally clear, that where a jurisdiction conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring jurisdiction.

Merchants' Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 544-45 (1867).

Moreover, a closely related issue was decided in the case of *Brotherhood of Locomotive Engineers v. Burlington Northern,* 580 F. Supp. 797 (D. Colo. 1984). There the district court was faced with the issue of what happened to pending claims in federal district court after 45 U.S.C. § 797(c)(g) had been amended to require arbitration for these claims. The court, after thorough review of the authorities, found that claims brought correctly in federal court before the enactment of the arbitration provision lacked jurisdiction after its effective date.

Clearly, jurisdiction was withdrawn in the present case by the amendment of 45 U.S.C. § 797(c)(g). Appellants' case was not even properly pending in federal court at the time of the amendment. Thus, there is no conceivable basis for jurisdiction under any vested rights theory.

D. Section 122 of RITEA Does Not Create A Private Right of Action

The former Rock Island employees next contend that section 122 of RITEA creates a cause of action in federal court. We disagree.

Section 122 of the Act, 45 U.S.C. § 1017, provides:

> The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of a carrier which * * * was the subject of a proceeding pending under section 77 of the Bankruptcy Act or under subchapter IV of Chapter 11 of Title 11. The use of such tracks and facilities shall be under the terms of compensation as the carriers establish between themselves, or if the carriers are unable to agree under such terms of compensation as the Commission finds to be reasonable. * * *
>
> In carrying out the provisions of this section, the Commission shall require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission.

Section 105 already creates a cause of action. *See* 42 U.S.C. § 1004. It is unlikely that, without some additional special purpose, Congress intended to create a duplicative action. Moreover, the language of section 122 only authorizes the ICC to act and does not support an interpretation which would provide jurisdiction for individual suits.

In a related argument, appellants contend that section 122 and 28 U.S.C. § 1336[10] together create federal court jurisdiction over their claims. We again disagree.

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[10]28 U.S.C. § 1336 provides in relevant part:

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Section 1336 of 28 U.S.C. permits the federal courts jurisdiction over causes of action elsewhere enumerated. It says nothing about causes of action based on alleged violations of section 122 or of ICC orders issued pursuant thereto. Moreover, the Supreme Court has repeatedly held that jurisdictional statutes such as 28 U.S.C. § 1336 do not of themselves establish a private right of action. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

E. Plaintiff's Unfair Representation Claims are Barred by the Statute of Limitations

In terms of the unfair representation claims brought by the former Rock Island employees, we agree with the district court, both in that these claims are governed by the six-month statute of limitation set forth by the Supreme Court in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

Thus, the claims of only one group of appellants have been preserved. The statute of limitations on the ground service employees suit began to run on May 20, 1983, the date the arbitration award was issued. They brought their action on November 18, 1983, two days before the expiration of the six-month limitation period. Thus, their

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(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, an order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, an order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

claims are preserved. *See Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1232-33 (8th Cir. 1987).

IV. REMEDIES AVAILABLE TO APPELLANTS

A. Overview

Given the fact that the appellants' substantive claims cannot properly be brought in federal court, we now turn to the task of determining what remedies, if any, remain available to them.

For purposes of resolving this question, the 158 individual claimants involved in the present action are best divided into three categories: March 4th Agreement appellants, non-hire appellants, and new-hire appellants.

1. The March 4th Agreement Appellants.

The March 4th Agreement appellants are thirty-three individuals hired by the CNW who claim they were not given adequate seniority under the March 4th Agreement. This group can be subdivided into two classes: the ground service employees and the engine service employees.

a. The Ground Service Employees

Nine of the thirty-three March 4th appellants were former ground service employees of Rock Island represented by the UTU. These employees were subjct to the October 22, 1980 interim implementing agreement. They claimed that this implementing agreement was improper for several reasons and went to arbitration to protest its terms. Their claims were rejected by the arbitrator.

b. The Engine Service Employees

Twenty-four of the March 4th appellants were former engine service employees represented by both the UTU and the BLE. These employees were subject to two February 16, 1982 implmenting agreements reached between the CNW and their respective unions. These employees, like the ground service employees, claim that the implementing agreements governing their seniority were improper. These appellants, however, did not take their protests to arbitration.

2. The Non-Hire Appellants

This group comprises eighty-one employees who applied for employment with the CNW in 1980 or 1981 for available positions but were not hired. Instead, the CNW hired persons without prior service on either the Rock Island or the CNW. This group claims they had a right to be hired both under the March 4th Agreement and Section 105 of RITEA, 45 U.S.C. § 1004.

3. The New-Hire Appellants

This group is made up of forty-four former Rock Island employees taken on by the CNW as "new hires" for work the CNW claims did not arise out of the acquisition of the Rock Island. These appellants claim a deprivation of seniority rights under the terms of the March 4th Agreement.

B. The Arbitration of the Ground Service Appellants

The March 4th ground service employees contend that the arbitration proceeding of May 20, 1983, was improper and must be vacated. We agree.

1. The Duty of Fair Representation

In order to establish unfair representation by a union, the claimants must show that the union's representation was "perfunctory, arbitrary, discriminatory, or in bad faith." *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 47 (1979). A union representing a majority bargaining coalition owes a strict supplementary duty of fair representation to the position of a minority group within the coalition with interests adverse to the majority. In *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944), the Supreme Court held "that the organization chosen to represent a craft is to represent all of its members, the majority as well as the minority and is to act for and not against those whom it represents." *Id.* at 202. Further, in *Vaca v. Sipes,* 386 U.S. 171, 177 (1967), the Court declared:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

This duty to the interests of an adverse minority is perhaps most thoroughly delineated in the case of *Jones v. Trans World Airlines,* 495 F.2d 790 (2d Cir. 1974). In *Jones,* the Second Circuit found a breach of the duty of fair representation by a union representing an adverse minority group sufficient cause to set aside the seniority provisions of a collective bargaining agreement.

In *Jones,* Trans World Airlines (TWA) entered into a collective bargaining agreement with the International

Association of Machinists and Aerospace Workers International Union (IAM) in January of 1970. Prior to this time, certain employees titled "passenger relations agents" had not been asked to join a union and were not required to join a union under the union security clause in effect at that time. Moreover, prior to that time, the collective bargaining agreement provided that all employees would hold job senioriy status as of the date of their job assignment.

Under the terms of the new agreement, the work of passenger relations agents was included within the jurisdiction of the IAM in the "guards" bargaining unit. TWA and IAM further agreed that the passenger relations employees would be treated as new hires for the purpose of seniority. The effect of this was to make any IAM members who wished to transfer to the job of passenger relations agent senior to all non-IAM employees who had previously held these positions, despite the fact that the old contract fixed seniority by the date of assignment to a given job classifcation.

In June of 1970, TWA announced that the passenger relations jobs were guard vacancies. Twelve members of the IAM guard unit bid for the jobs and were given seniority as of the date they assumed the duties of passenger relations agents, i.e. June 22, 1970. The rest of the jobs were filled by non-IAM workers who were then holding these positions. These workers were given seniority as of the dates they joined the union, generally sometime in July or August of 1970. When the new union members found out they had less seniority than the twelve newcomers to their department, they brought an action in district court

claiming that the unions had unfairly represented them. The district court denied relief.

The Second Circuit reversed. The court found that the only characteristic that distinguished the new union members from the employees afforded greater seniority was the fact of union membership prior to the January 1970 collective bargaining agreement. The court termed this sort of discrimination in the negotiation of seniority "arbitrary and invidious" and found that such conduct "violate[d] the unions' duty to represent fairly all members of the bargaining unit." *Id.* at 797.

The court declared that, while the standard for unfair representation generally involves arbitrary, perfunctory, or discriminatory conduct, the union must meet a higher standard when the interests of an adverse minority are affected. Specifically, the court said the union representative must provide "substantive and procedural safeguards" for the minority group.

> [I]t is evident that a union may breach its duty of fair representation by actions other than those motivated by anti-minority animus. While it is true that situations in which a union violates its duty have been identified by such phrases as "hostile discrimination," * * * and "arbitrary, discriminative," or "bad faith" conduct, * * * these phrases do not delimit the specific categories of violations of the duty of fair representation. They only serve to emphasize that the union has broad discretion to adjust the demands of competing groups within its constituency as long as it does not act arbitrarily. * * *
>
> *In the instant case, the IAM's duty to the appellants was broader than a mere duty not to negotiate the 1970 contract seniority provisions out of hostility*

> *toward them. The objectives of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit.*

Id. at 798 (citations omitted and emphasis added).

The court then declared that the seniority of the former passenger relations employees should be determined as of the date of original job assignment.

2. Impropriety of the October 22, 1980 Interim Implementing Agreement

The October 22, 1980 implementing agreement was negotiated by representatives of CNW employees in contravention of the terms and the purpose of the March 4th Agreement and it was thus hopelessly flawed.

The March 4th Agreement was designed to fill a practical necessity by easing the potentially troubled transition period during which the CNW acquired the Rock Island Railroad. The purpose of the March 4th Agreement was to provide the CNW labor peace in exchange for accommodation in terms of jobs and seniority for the former employees of the Rock Island Railroad. Thus, the terms of the March 4th Agreement were not a gratuitous gesture by the CNW to the former Rock Island employees, but represented "bargained-for" consideration in the truest sense of the term.

When a highly unionized rail carrier takes over the trackage of another highly unionized carrier, whether by merger or acquisition, unless assurances are made to the employees of both acquiring and acquired railroads, labor dislocation and strife is likely to be bitter and endemic.

First, the employees of the acquired company face the personally devastating prospect of losing long-standing valued seniority rights and, more importantly, of losing jobs. In such a period, displaced employees are likely to force the representatives of their local and international unions into using pressure tactics to force the acquiring company into some sort of an accommodation, both in terms of rights to hire and job seniority. The acquiring companies are very susceptible in this sort of pressure, because they themselves are highly unionized—generally with the same unions as the acquired company. In addition, they are dependent on the skilled labor force which the union dominates.

The complication, however, does not end here. On the other side of the coin, the incumbent employees of the acquiring companies are likely to feel threatened by the hiring of new employees with advanced seniority rights and are likely to demand some sort of firm assurance, both in terms of their job status and vested authority rights.

To settle these conflicts, a common and well-established practice in acquisitions or mergers is to engage in some sort of dovetailing of seniority. *See Humphrey v. Moore,* 375 U.S. 335, 347 (1964) (The integration or dovetailing of seniority is "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption.").

In terms of seniority allocation for former Rock Island employees hired by acquiring railroads, section 9 of the March 4th Agreement sets forth procedures to determine job status. Specifically, it states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

March 4th Agreement at 7.

Carefully parsing the words of this difficult phrase and reviewing alternative interpretations of it, it is clear that any correct construction must include the representatives of the former Rock Island employees in these negotiations.

One construction would have this phrase mean that an "agreement" would be reached at a future time with regard to seniority allocation as amongst the combined groups of pre-acquisition CNW employees and former employees of the Rock Island recently employed by the CNW. This construction would not in any way specify the parties to the potential agreement and would thus leave the selection of these parties completely within the control of the CNW. Such an utter abdication of power over selecting the parties to determine seniority, however, would result in the complete loss of control over seniority allocation and thus runs contrary to the purposes of the Agreement, i.e., to protect the interests of the former Rock Island employees and to avoid labor strife in the critical transition period. Moreover, if the purpose of the agreement was to give the company the power to determine seniority, it is likely that the agreement would simply have said this.

A second construction, implicitly urged by appellees, would have this clause create a procedure whereby senior-

ity agreements would be reached between the CNW and representatives of the CNW's unions. The text, however, does not support such a construction. Further, the March 4th Agreement was designed to protect the seniority rights of former Rock Island employees. Yet, it is vital to realize that there is no group that would be less inclined to protect the seniority rights of the Rock Island employees than the representatives of the CNW employees. The reason is simple. Any seniority credit given Rock Island employees for work performed while with the Rock Island would adversely affect the seniority rights of the employees of the CNW. Given this, the representatives of the CNW unions could be expected to favor the interests of the pre-acquisition employees, utterly frustrating the purposes of the agreement. Thus, this second construction could not possibly be correct.

The third and correct construction would require the implementing agreements be reached with the *active and significant participation of the representatives of the former Rock Island employees.* Strong support for this construction is found in the March 4th Agreement's purpose, to protect the interests of former Rock Island employees, in the union's constitution, and in *Tucumcari,* which, in delineating internal UTU policy, declared that all employee representatives should participate in the negotiation of implementing agreements.[11]

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[11]We recognize that *Tucumcari* did not involve commingled work and realize this fact could possibly have some bearing on its applicability in terms of the specific seniority allocation in this case. However, we believe that *Tucumcari's* central holding—that all employee representatives should participate in the formulation of implementing agreements—is unaffected by this distinction.

3. The Arbitration Proceeding Was Improper

The ground service employee arbitration was fundamentally improper because the arbitrator deferred to an invalid and fundamentally unfair implementing agreement.

The arbitrator clearly based his decision on the October 22, 1980 interim agreement. He declared, deferring to the implementing agreement and the position of the acquiring company's union representatives, without support from the record or any coherent reason, that the Rock Island employees had sufficient participatory rights to ensure the implementing agreement was consistent with the March 4th Agreement. Further, he specifically deferred to the terms of the October 22, 1980 agreement, declaring both that it would be inappropriate to make a redetermination of seniority and that prior rights and dovetailing were not contemplated by the March 4th Agreement.

Next, although not necessary to our holding, we note the arbitrator made his determination without an understanding of the requirements of the union's constitution. To conform with the UTU constitution, the union should have entered the arbitration with a unified position and actively sought seniority for Rock Island employees. What happened in the ground service employees' arbitration, however, could not have been more different. The union allowed the claims of the CNW employees with regard to the allocation of seniority—a position contrary to its centrally determined seniority policy—to go unchallenged to the arbitrator. This impropriety strongly contributed to providing a legitimate forum to a position which it had

previously determined illegitimate and which otherwise would probably not have prevailed.[12]

4. Conclusion

In *Jones,* the Second Circuit found that the duty of fair representation had been violated when a union preferred long-term members' interests to those of new members. In some intuitive ways this line of conduct by the union might seem justifiable. It might be argued the union owed more loyalty to those long term members than to those employees not yet members of the union. Nevertheless, the court found this conduct to be "arbitrary" and "invidious." Further, the court delineated a clear obligation to represent these future members and to assure them substantive and procedural safeguards in the contract talks.

In terms of the negotiations of the October 22, 1980 implementing agreement, the inherent force of *Jones* cuts powerfully in favor of the Rock Island appellants. First, the former Rock Island employees are in a stronger position to assert unfair representation than the non-union

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[12]The UTU and CNW contend that the UTU had internally determined Article 90 was not applicable "in cases of partial or total abandonment or liquidation where other carriers purchase or lease the trackage abandoned or liquidated." *See* Supplemental Affidavit of Robert Schmiege, Exhibit 5 at 22. The UTU further contends that the matter was to be "handled in accordance with the arbitration procedures of the March 4 agreement." Searching the record, however, we find no persuasive evidence that this exemption was anything more than an *ad hoc* decision made to avoid the union's responsibilities in this particular dispute. Moreover, we find nothing in the March 4th Agreement which would conflict with the unified procedure outlined in the UTU constitution.

passenger relations agents in *Jones*. While, in a sense, both groups stood poised to become members of the group represented by their bargaining agent, the Rock Island employees were already members of an international charged with representing their interests. Thus, not only are the Rock Island employees owed the substantive and procedural guarantees mandated by *Jones*—protections which were clearly not provided—but additional protection arising from their membership in the international union.

In addition, the UTU in the present case offended in more grievous ways affirmative duties of fair representation clearly imposed upon them. The March 4th Agreement and *Tucumcari* required the participation of the former Rock Island employees in the negotiation of the implementing agreements. Moreover, the appellants repeatedly requested participation. Finally, during the critical period of the transition, the UTU was actively closing down and consolidating its Rock Island union locals. This likely made it more difficult for the former Rock Island employees to understand and guard their rights and to determine whether their interests were being adequately protected by the CNW employees' representatives.

Essentially, however, we find that the October 22, 1980 implementing agreement was negotiated by representatives of a group with interests utterly hostile and adverse to those of the ground service employees, and was thus irrevocably flawed by unfair representation. The arbitrator then rendered a decision in which, without coherent or logical reasons, he deferred to the improperly negotiated agreement.

Under the Railway Labor Act, an arbitration can be vacated when the award exceeds the jurisdiction of the arbitrator. *See* 45 U.S.C. § 153(p). In the arbitration context, an award "without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction of the arbitrating body." *Brotherhood of Railroad Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 411-12 (5th Cir. 1969). The *Trainmen* court went on:

> To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract. This Court in *Safeway Stores v. American Bakery Workers Local 111*, 5th Cir. 1968, 390 F.2d 79, 81, 82, has recently announced the standard for review of an arbitrator's reward: "'[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.' * * * On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which there comes the 'common law of the shop' ".

Id. at 412.

In deferring to the fundamentally flawed agreement, the arbitrator's decision was not in any way derived from the "wording or purpose of the collective bargaining agreement." Indeed, the purpose of the March 4th Agree-

ment was to provide "a fair, equitable and *complete* arrangement for the *protection* of the Rock Island Employees." We hold this carefully delineated purpose could not be satisfied when the party negotiating for the ground service employees is the party with the single most adverse set of interests to appellants in the matter of seniority. We thus find the arbitrator exceeded his jurisdiction under the Railway Labor Act.

We, therefore, remand these cases to the district court with directions to enter an order vacating the ground service employees' arbitration. We further direct the district court to order the parties to renegotiate an implementing agreement in line with the requirements set forth in the March 4th Agreement. In these negotiations, the representatives of the Rock Island employees will participate in an *active and significant manner*. We leave it to the International to determine whether representatives of the former Rock Island employees will be necessary parties to the agreement, as its internal decision in *Tucumcari* strongly suggests, or whether they will be carefully consulted by the International prior to its negotiating the agreement.

Should the first course be chosen and the parties fail to reach a satisfactory agreement, the International shall represent both the CNW and former Rock Island employees in the arbitration that is to follow under the terms of the March 4th Agreement. Before the matter goes to arbitration, the International shall develop a unified position consistent with its constitution and internal decisions to assure adequate protection of the seniority interests of the former Rock Island employees. If the second course

is chosen, the International shall similarly be directed by the district court to present a unified position consistent with its constitution and internal decisions. Again, should the parties fail to reach agreement, the International shall represent both the CNW and former Rock Island employees in line with a predetermined unified position.

C. The Non-Hire Appellants

1. Overview

The appellants in this category are former Rock Island employees who claim a right to be hired under the March 4th Agreement and Section 105 of RITEA, 45 U.S.C. § 1004. As discussed above, the March 4th Agreement provides a right of first hire in terms of work arising out of the acquisition of former Rock Island trackage. RITEA provides a sweeping right of first hire to any former Rock Island employee who is not less qualified than other applicants for any position not covered by an affirmative action plan. These appellants allege that the CNW hired a great number of new workers who were not former Rock Island employees in violation of RITEA. Further, they allege that many of these new workers were hired to work on the former trackage of the Rock Island, thus violating the March 4th Agreement.

2. The Sunsetting Provision of 45 U.S.C. § 797(c)(f).

The arbitration provision which governs the appellants' claim is 45 U.S.C. § 797(c)(g). Subsection (f) of 45 U.S.C. § 797(c) states: "The provisions of this section shall cease to be effective on the expiration of the 6-year

period beginning on August 13, 1981." Based upon this sunsetting provision, appellees argue that appellants have lost their right to arbitration. Appellants, on the other hand, contend that because the statutory subdivision containing the arbitration provision has lapsed, they now have a clear and unimpeded right to an action in federal court. The theories of both parties are incorrect.

3. Arbitration is Still Available to Appellants

Upon careful examination, it is clear that Congress did not intend to phase out arbitral redress for disputes involving preferential hiring under RITEA. When the evolving structure and purpose of 45 U.S.C. § 797(c) is carefully examined, it is apparent that the sunsetting provision of that section was intended to eliminate the Central Register of Railroad Employment administered by the Railroad Retirement Board (RRB) and not to cut off the right to arbitration for disputes concerning preferential hiring.[13]

45 U.S.C. § 797, which corresponds to Title VII of the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (NRSA), was a part of the massive Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (OBRA) designed, at least at the outset, to drastically reduce the size and commitments of the federal government.

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[13]Moreover, even had Congress intended to eliminate arbitration for disputes concerning preferential hiring, it might well be considered fundamentally unfair to withdraw the arbitral remedy from those claims already pending in federal court on August 13, 1987. *Cf. Ralpho v. Bell,* 569 F.2d 607 (D.C. Cir. 1977).

Title VII, part of the effort to privatize the failing Conrail, allowed the railroad to end onerous protective obligations that had been established by Title V of the Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1973). Specifically, Title VII allowed the railroad to terminate some employees or employee benefits in exchange for specified cash payments.

Part of the transition that was accomplished by Title VII involved the creation of a central register of displaced railroad employees. The register was to be of limited duration and was designed to assist employees in securing their preferential hiring rights. *See* NRSA § 704, 45 U.S.C. § 797(c). As originally introduced in Congress, § 797(c) contained only the provisions found in subsections now codified (a) through (f). *See* H.R. 3488, 97th Cong., 1st Sess. § 303 (introduced May 5, 1981); S. 1377, 97th Cong., 1st Sess. §§ 413-4 (introduced June 7, 1981). Subsections (a) through (e) require the RRB to maintain a central register of displaced railroad employees to facilitate their reemployment and to assist in the implementation of preferential hiring rights. Subsection (f) was the sunset provision which allowed the RRB to end the registration apparatus within a reasonable time after the employee terminations allowed by NRSA.

It is important to note that subsection (g) of § 797(c), the arbitration provision at the heart of the present controversy, was not a coherent part of the legislative scheme of the original § 797(c), but only a last minute afterthought added later in conference. *See* H.R. Conf. Rep. No. 97-208, Book 1, 1st Sess., 329-30 (1981). It must be remembered that OBRA itself has long been noted for the

vast legislative confusion engendered and the significant number of drafting oversights and errors that occurred as it wended its way through the Congress. Given this background, it is likely that any implication that Congress intended the right to arbitration for preferential hiring to end with this sunsetting provision was inadvertent.

This likelihood of inadvertency becomes a certainty when one examines the internal structure of Title VII. Title VII addresses a broad range of issues affected by the NRSA.[14] with only a few exceptions, it subjects disputes concerning these various topics to resolution under section 714, 45 U.S.C. § 797(m), which provides for arbitration by an adjustment board under section 3 of the Railway Labor Act, 45 U.S.C. § 153. Section 714 has no sunset provision.

The right to preferential hire was one of the few exceptions to arbitration under section 797(m), largely because the right to preferential hire was initially related to the central register maintained by the RRB. The only substantive difference between section 797(c)(g), the arbitration provision at issue here, and section 797(m) is that the former subjects the right to arbitration to a preliminary screening by the RRB, the board charged with main-

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[14] *E.g.*, negotiation of protection agreements (§ 797); termination allowances (§ 797(a)); preferential hiring (§ 797(b)); maintenance of a central register of railroad employment (§ 797(c)); election and treatment of benefits (§ 797(d)); arrangement of work (§ 797(e)); contracting out (§ 797(f)) new collective bargaining agreements (§ 797(g)); employee and personal injury claims (§ 797(h)); limitation on liability (§ 797(i)); preemption (§ 797(h)); factfinding panels regarding certain collective bargaining issues (§ 797(i)); and arbitration of disputes (§ 797(m)).

taining the central register. The substantive arbitration of both types of disputes is eventually accomplished by an adjustment board under 45 U.S.C. § 153. While the central register was in existence, it certainly made sense to subject preferential hiring claims to a preliminary screening by the RRB, which would be likely to have all the relevant information concerning these claims close at hand. Yet, the Congress could not have intended to cut off the right to arbitration completely to employees who had preferential hiring claims when the central register ceased to exist, particularly when arbitration was still available to those asserting grievances under almost all the other topic areas covered by Title VII.

We, therefore, find, as a matter of statutory interpretation, that the sunsetting provision of 45 U.S.C. § 797(c) only applies to the maintenance of the Central Register of Employees required under Title VII and that claims involving preferential hiring of former Rock Island employees with the CNW remain subject to arbitration by an adjustment board under section 3 of the Railway Labor Act, 45 U.S.C. § 153.

4. Conclusion

a. Specific Remedy to Non-Hire Appellants

Given the fact that the right to arbitration under 45 U.S.C. § 797(c)(g) still is open to appellants, we remand to the district court with directions to send the disputes under RITEA to be resolved by an adjustment board under section 3 of the Railway Labor Act. Moreover, the adjustment board should, at the same time, consider appellants' claims arising under the March 4th Agreement.

b. Laches

Because neither RITEA nor the March 4th Agreement has any specific period of limitations, we leave to the arbitrator the question of whether the claims of the non-hire appellants are barred by laches.

In deciding this issue, the arbitrator is directed to take into account the following factors. First, the arbitrator should consider the delay in seeking redress caused by the closing of the Rock Island locals by various internationals. In this regard, the arbitrator should determine whether the former Rock Island employees were adequately informed of their rights under RITEA and the March 4th Agreement. Specifically, he should determine whether there were false assurances made by union representatives to the effect that Rock Island grievances would be redressed and the effect such assurances might have had in delaying action by the Rock Island employees.

Second, the arbitrator should take into account the cumulative effect of the serious unfair representation by the internationals in terms of the March 4th appellants. Not only did the unions act unfairly in the negotiation of the implementation agreement of the ground service employees, but they also did not properly represent the former Rock Island employees in the arbitration. This unfairness by the internationals to the March 4th appellants may have convinced the non-hire appellants that it would be futile to process their claims through conventional channels because they believed they could not rely on their union representatives to adequately represent their interests.

D. March 4th Engine Services Employees

The Newton engine service employees claim that the seniority they received under the implementing agreements of February 22, 1982, was inadequate under the terms of the March 4th Agreement. The CNW answers that these employees were treated fairly.

We hold that the March 4th Engine Service plaintiffs have the right to have their claims submitted to a neutral arbitrator to determine whether their seniority rights were adequately protected under the terms of the February 16, 1982 implementing agreement. Appellants' claims are, however, subject to the defense of laches. In determining whether appellant's claims are barred by laches, the arbitrator should take into account all those factors listed in section IV(C)(4)(b) of this opinion.

E. The New-Hire Appellants

A fourth group of claimants are the new-hire appellants. These appellants were hired by the Rock Island after its acquisition by the CNW. They received no seniority and contend that their rights were violated under the March 4th Agreement. The CNW contends that the jobs the new hire appellants received did not arise out of the work related to the Rock Island acquisition, and thus they were not deserving of any seniority under the March 4th Agreement. Clearly, if the work did not arise directly from the Rock Island acquisition, the CNW is correct.

These new-hire appellants have the right to have their claims submitted to a neutral arbitrator to determine whether the jobs they received arose from the acquisition and, if they did, what seniority rights are due these appel-

lants. Appellants' claims are, of course, subject to the defense of laches. In determining whether appellants' claims are barred by laches, the arbitrator should take into account all those factors listed in section IV(C)(4)(b) of this opinion.

V. CONCLUSION

This matter is remanded to the district court for action consistent with this opinion. Each party will bear its own costs on appeal. The mandate of this Court shall issue forthwith.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1369

L. Lee Beardsly,

Appellant,

v.

Chicago & North Western Transportation Co., et al.,

Appellees.

* * * *

Francis E. Amoit,

Appellant,

v.

Chicago & North Western Transportation Co., et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

No. 86-1370

John E. Reece, et al.,

Appellants,

v.

Chicago & North Western Transportation Co., et al.,

Appellees.

No. 86-1372

Jack L. Chambers, et al.,

Appellants,

v.

Chicago and North Western Transportation Company, et al.,

Appellees.

No. 86-1373

Roger L. Swift; Oscar D. Overton; W. R. Urton; Robert W. Luth; Mark R. Pomery; David G. Dickey; Terry B. Turvold and Clyde R. Thomas,

Appellants,

v.

Chicago and North Western Transportation Company; United Transportation Union, an unincorporated labor organization; and The Brotherhood of Locomotive Engineers, an unincorporated labor organization,

Appellees.

No. 86-1374

Harold L. King; James L. Knox; Steven Arthur Newton; George R. Etherton; Larry L. Williams; John F. Keith; and Joseph A.

Appellants,

v.

Chicago and North Western Transportation Company and The United Transportation Union, an unincorporated labor organization,

Appellees.

No. 86-1950

Vane Newton; Robert R. Bailey; Wayne A. Moore; Robert L. Duncan; Harold E. Johnson; Donald L. Kidd, Sr.; H. L. Kidd, Jr.; B. J. Rude; Max A. Eads; Jack E. Brown; Milton E. Capps; Wilbur Stanton; J. W. Burke, Jr.; E. D. Snyder; Daniel V. Middour; Donald P. McCaleb; Sam H. Dean; Donald E. Bisgaard; Robert W. Shaner; LaDon E. Crane; Roger L. Rothamel; Arnold M. Scheel; Frank M. Ramey; A. M. McQuade; Lloyd G. Andrews;

Richard D. Thorsland; John R. Vincent; Stephen R. Early; Leo T. Seehan; and Richard A. Nitcher; John E. Beghtol; Dennis E. Chaplin; Paul W. Strawn; Max R. Williams; David Yackle; Francis E. Amiot; James F. Ramsey; Allan P. Sherling; Jerry E. Payne; Richard A. Clark; Kenneth W. Brevig; Stephen D. Rosentangle and William H. Rosentangle,

Appellants,

v.

Chicago and Northwestern Transportation Company; United Transportation Union, an Unincorporated Labor Organization; and Brotherhood of Locomotive Engineers and (sic) Unincorporated Labor Organization,

Appellees.

No. 87-1325

Angeline V. Boll, Robert J. Tollakson and Dennis L. Stowe,

Appellants,

v.

Chicago and North Western Transportation Company, and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, an unincorporated labor organization,

Appellees.

Submitted: August 31, 1987

Filed: January 8, 1988

Before HEANEY, BOWMAN and WOLLMAN, Circuit Judges.

HEANEY, Circuit Judge.

I. OVERVIEW

One hundred fifty-eight former employees of the Chicago, Rock Island and Pacific Railroad (Rock Island or Rock Island Railroad) appeal from decisions of the United States District Court for the Southern District of Iowa dismissing or denying their claims against the Chicago & Northwestern Transportation Co. (CNW) and four railroad labor organizations.[1] The suits allege violations of

[1]The United Transportation Union, the Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

a labor protective agreement and a United States statute, both designed to protect the job status of the former Rock Island employees.

We affirm the district court insofar as it dismissed several of the actions for lack of jurisdiction. We reverse the district court's denial of appellants' request to vacate an arbitration decision between the CNW and the United Transportation Union (UTU) regarding former Rock Island ground service employees. We find that the October 22, 1980 and February 16, 1982 seniority implementing agreements are invalid and direct that they be renegotiated. Finally, we hold the remaining employees have a right to arbitration, subject to the right of the CNW and the appellee unions to assert the defense of laches.

II. FACTUAL BACKGROUND

A. Attempted Reorganization, Interim Operation and Purchase of the Rock Island Railroad

In 1975, the Rock Island Railroad commenced reorganization proceedings. These efforts were unsuccessful. In September of 1979, the Interstate Commerce Commission (ICC) concluded that Rock Island had insufficient cash assets to continue its operations "in the face of national transportation requirements." On March 18, 1980, the ICC granted the CNW authority to conduct temporary operations over certain Rock Island lines from March 24 until May 31, 1980.[2] The ICC subsequently authorized the

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[2]During this period, several other railroads were also given authority to conduct operations over other parts of the former Rock Island lines. *See Kansas City Terminal Ry. Co.—Directed to Operate Over—Chicago, R.I. & P. R.R. Co., Debtor,* 360 I.C.C. 289, 290 (1979).

CNW to continue providing interim service over those lines until June 20, 1983, at which time a United States Bankruptcy Court approved the sale by the Rock Island trustee to the CNW of the lines upon which it had been conducting interim service.

B. The March 4th Agreement

On March 4, 1980, thirteen railroads who were operating or contemplating operations on Rock Island lines, including the CNW, entered into a labor protective agreement[3] with national representatives of rail labor organizations, including the national representatives of appellee unions involved in the present action.

The March 4th Agreement was designed to ease a potentially troublesome transition. The acquiring railroad agreed to make accommodations in terms of providing rights of first hire and seniority to the employees of the acquired company. In exchange, the international unions agreed to assure labor peace during the transition. Specifically, the stated purpose of this agreement was to provide:

> a fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated

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[3]This agreement, entitled Labor Protective Agreement between Railroad Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating through the Railway Labor Executives' Association, is reproduced in 1 Joint Appendix 131.

> in the most efficient manner, as set forth herein, immediately upon authorization for such operation.

March 4th Agreement at 1.

Article II of the Agreement provides that the purchasing carrier shall determine by craft its necessary additional manpower requirements "due to its taking over . . . [the] Rock Island lines." *Id.* at 3. The acquiring carrier further agreed to provide a detailed explanation of these needs, to "discuss" its requirements with representatives of the crafts employed by both the acquiring and acquired railroad, and to extend to employees of the acquired railroad the right of first hire in all work stemming from the acquisition. *Id.* This right of first hire was to accrue to employees in order of their seniority.[4]

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[4]Specifically, Article II of the March 4th Agreement provides:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over [the] Rock Island [line]. * * * Each of the determinations shall be discussed with representatives of the crafts on purchasing carrier and on the Rock Island * * * with detailed explanations to them of the basis for each determination prior to serving notice under paragraph 4 hereof.
>
> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island * * * the first right of hire * * * dependent on whose trackage is involved and consistent with the purpose of Section 8 of the Milwaukee Railroad Restructuring Act. * * * In carrying out the purposes of this section, the purchasing carriers shall first utilize existing seniority rosters applicable to the appropriate craft and seniority district of the lines and territories involved in fulfilling employment needs in connection therewith.

Article II, section 9, of the Agreement sets forth procedures to determine job seniority for former Rock Island employees hired by the CNW. It states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

C. The Rock Island Railroad Transition and Employee Assistance Act—RITEA.

On May 30, 1980, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act (RITEA) Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified as amended at 45 U.S.C. § 1001). The purpose of this act was twofold: (1) to protect the interests of former Rock Island employees and (2) to protect the railroads against labor strife and ensure continued operation of the lines formerly controlled by the Rock Island railroad.[5]

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[5]Under the "Congressional Findings" section, the Act states:

> (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
>
> (2) for those Rock Island Employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
>
> (3) a cessation of necessary operations of the Rock Island would have serious repercussions on the economies of the States in which such railroad principally operates; and

(Continued on following page)

Section 105 of the Act, 45 U.S.C. § 1004, entitled "Railroad Hiring," provides a broader right of first hire than the March 4th Agreement. Where the March 4th Agreement limits the right of first hire to work stemming from the acquisition of the Rock Island, RITEA provides a blanket right of first hire to former Rock Island employees.[6] Specifically, it states that former employees of the Rock Island:

> shall, unless found to be less qualified than other applicants, *have the first right of hire by any other*

(Continued from previous page)

> (4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of vital commuter service.

RITEA § 102, 45 U.S.C. § 1001.

[6]The House conference report accompanying RITEA describes the purpose of Section 105 in the following terms:

> SECTION 105—RAILROAD HIRING
>
> *Senate Bill.*—Section 105 of the Senate bill is based on a similar provision in the Milwaukee Railroad Restructuring Act. *It provides for priority hiring of Rock Island employees unless they are found less qualified than other applicants* or unless such priority hiring would interfere with a carrier's equal opportunity employment obligations.
>
> *House Amendment.*—The House amendment . . . is also patterned after the Milwaukee Railroad Restructuring Act. It specifically states that rights afforded to Rock Island employees under this section shall be coequal to rights afforded Milwaukee employees.
>
> *Conference Substitute.*— * * * In general, this section is intended to insure that eligible Rock Island employees will be hired without delay or discrimination. The successful implementation of this provision depends upon the full cooperation of other carriers.

H.R. Conf. Rep. No. 96-1041, 96th Cong., 2d Sess. 25 (1980) (emphasis added).

> *rail carrier that is subject to regulation by the [ICC] for any vacancy* that is not covered by [an affirmative action plan].

45 U.S.C. § 1004 (emphasis added).

On January 14, 1983, the arbitration provision of the Regional Rail Reorganization Act, 45 U.S.C. § 797(c)(g), was amended to subject disputes regarding the right of first hire under RITEA to mandatory arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2543, 2547 (1983). Prior to this time, an action could theoretically be brought in federal court to enforce this right. *See Brotherhood of Locomotive Engineers v. Burlington Northern,* 580 F. Supp. 797 (D. Colo. 1984).

D. Propriety of Implementing Agreements Negotiated Under the March 4th Labor Protective Agreement

1. Factual Background

To understand appellants' claims concerning the validity of the implementing agreements negotiated under the authority of the March 4th labor protective agreement, it is important to take note of certain circumstances surrounding the negotiation of these agreements. Specifically, the effect of the closing and consolidation of local unions must be understood, as well as obligations imposed on the negotiating unions by their own constitutions.

a. National Unions Close Down Local Rock Island Locals

Shortly after the March 4th Agreement and RITEA went into effect, the international unions here involved

closed down or consolidated many of the locals serving former Rock Island employees. They maintain these closings or consolidations were an economic necessity because members had ceased paying dues. *See* Affidavit of Robert L. Hart, 5 Joint Appendix 1057, 1057-58. The appellants maintain that the closing or consolidation of the locals resulted from a conspiracy among the international unions, the CNW, and the local unions representing CNW employees to undermine the bargaining strength of the former Rock Island employees. *See generally,* 1 Joint Appendix 16-130. As evidence of this, they note that local union officials were unavailable to file grievances and that representatives of the internationals engaged in a pattern of falsely assuring former Rock Island employees that action would be taken on grievances. *Id.* Further, appellants maintain that in the confusion and consolidation, they were not informed of the safeguards, such as the March 4th Agreement and RITEA, enacted to assure their job-related rights. *Id.* Whatever the reasons for the closings or consolidations, they clearly made it more difficult for the former Rock Island employees to understand their rights and to determine whether they were being adequately protected by their internationals.

b. The United Transportation Union Constitution

Article 85 of the United Transportation Union (UTU) Constitution[7] provides that the General Chairman em-

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[7]Article 85 of the UTU Constitution provides in relevant part:

(Continued on following page)

powered to make a "systems" agreement, such as the implementing agreements involved in the present dispute, must poll the "affected Local Chairmen", i.e. the Chairmen for the CNW employees and the Rock Island employees, prior to signing such an agreement and be governed by the majority of votes cast. Moreover, in negotiating such agreements, the seniority of employees of acquired railroads is to be preserved to "the extent possible".[8] In addition, Article 90 mandates that all intra-union disputes surrounding an acquisition or merger be resolved internally by the union. This ensures that a unified position can be established with respect to these disputed

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> The General Chairman must poll the entire General Committee prior to signing any system agreements and be governed by the majority of the votes cast. The General Chairman must poll the affected Local Chairmen prior to signing any local agreements and be governed by the majority of the votes cast.
>
> *See* Joint Appendix 315, 347 (emphasis omitted).

[8]Article 90 of the UTU Constitution provides in relevant part:

> When, through lease, purchase, merger, consolidation or other cause, a line or lines of a carrier or a portion thereof is taken over by another carrier or where, because of establishment of a new line by an existing carrier or for other reasons traffic is permanently diverted from one carrier to another or from one road and/or yard seniority district to another on the same carrier and such affects the seniority rights of employees on such carriers, General Committees of Adjustment shall arrange for a fair and equitable division of the work. *Prior seniority rights of employees to service on their former seniority district or territory shall be preserved to the extent possible.*

See Joint Appendix 315, 348-49 (emphasis added).

issues and preserves internal union authority over the interpretation of its constitution.[9]

2. Negotiation of the Implementing Agreements

Pursuant to Article II of the March 4th Agreement, the CNW sought to conclude implementing agreements with respect to the relative seniority rights of its employees and the former employees of the Rock Island Railroad it had hired. Although the CNW did involve the union representatives of the former Rock Island employees in preliminary discussions, these representatives were not present when the final agreements were reached, were not parties to these agreements, and had virtually no control over the terms of these agreements.

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[9]Article 90 continues:

> Disputes arising under this Article which cannot be resolved by the General Committee or General Committees shall be referred to the International President. The International President shall promptly assign an officer to assist the General Committees involved in resolving the dispute. Failing to resolve the dispute the officer shall make a complete report and recommendation to the International President who, in turn, shall decide the dispute.
>
> Any local or member of a local affected by an action or decision of a Chairman, Sub General Committee or General Committee, or by the decision of the International President with respect to the Article may appeal such action or decision to the Board of Appeals, provided such appeal is filed with the General Secretary and Treasurer within ninety (90) days from the date of the action or decision. The Chairman, Sub General Committee, General Committee, or International President, as the case may be, shall be allowed thirty (30) days from the date the appeal is filed in which to reply to the appeal. The parties involved in an appeal shall exchange copies of the appeal and reply to the appeal.

Final implementing agreements with engine service employees represented by the the Brotherhood of Locomotive Engineers (BLE) and the UTU were signed by the CNW General Chairmen for the BLE and the UTU on February 16, 1982. *See* 7 Joint Appendix 1399.

On October 22, 1980, the CNW and two UTU General Chairmen of the Committee of Adjustment for the CNW—G. R. Maloney and Thomas Q. Ryan—signed an interim agreement. This agreement determined the relative seniority rights of former Rock Island employees and employees of the CNW in terms of ground service work.

3. Arbitration of UTU Rock Island Ground Service Employees

a. The Arbitration Proceeding

On April 15, 1981, the General Chairman of the Committee of Adjustment for UTU Rock Island, Ralph Tambaro, sent a letter to the CNW objecting to the October 22, 1980 interim implementing agreement insofar as it related to ground service employees. *See* 7 Joint Appendix 1437. He objected, in part, because the agreement had been reached without the participation of the union representatives of former Rock Island employees and, in part, because it failed to give Rock Island employees seniority rights to which they felt entitled under the March 4th Agreement. Tambaro demanded arbitration pursuant to Article II, section 9(b) of the March 4th Agreement. On May 4, 1981, the CNW received a second letter from Fred Hardin, the International President of the UTU, seeking to invoke the same arbitration procedure on behalf of former Rock Island ground service employees. On

May 18, 1981, Hardin by letter indicated that R.M. Crago, UTU International Vice President, would represent the UTU's Rock Island employees in the arbitration, but would not act as a representative of the international union.

Next, the CNW and CNW-UTU filed suit to stop this arbitration and succeeded in delaying it for approximately one and one-half years. *See Chicago and Northwestern Transportation Co. v. United Transportation Union,* C.A. 81-2472 (D.D.C); *see also* Supplemental Affidavit of Robert W. Schmiege, 7 Joint Appendix at 1496. Thereafter, the arbitration went forward. The CNW and representatives of the Rock Island and the CNW ground service employees participated in the arbitration, which was conducted between February 23 and 25, 1983, by a neutral arbitrator appointed by the National Mediation Board. *See* Arbitration Board No. 406, *Matter of Arbitration Between the Chicago and Northwestern Transportation Company and The United Transportation Union,* at 2 (May 20, 1983) (Arbitration) (*see* 2 Joint Appendix 267). Although the UTU constitution required the union to enter the arbitration with a unified position, the arbitration consisted of a contest between the Rock Island UTU representatives and the CNW-UTU representatives, with the international union playing no significant independent or authoritative role.

b. The Tucumcari Case

Shortly after the matter was submitted to arbitration, but several months before the arbitrator rendered a decision, a relevant internal dispute was being resolved

within the UTU. In UTU Board of Appeals Case No. 64, File 8-8-54 (March 11, 1983) (*Tucumcari*) (*see* 2 Joint Appendix 441), former employees of the Rock Island challenged an implementing agreement quite similar to those involved in the case before us.

In *Tucumcari,* a segment of the former Rock Island railroad called the Tucumcari line had been purchased after a period of interim operation by the St. Louis Southwestern Railroad (SSR) on March 24, 1980. Pursuant to the terms of the March 4th Agreement, a subsequent implementing agreement was reached purporting to establish a seniority scheme for the former Rock Island employees.

The implementing agreement was signed by General Chairman R. H. Arnett, on February 23, 1982. Arnett was the representative of the SSW-UTU, the acquiring company's union, and had never represented Rock Island employees. As in the present case, the agreement gave former Rock Island employees seniority dates as of their first day of work for the SSW.

Two former Rock Island employees, J. W. Volkman and J. T. Kelso, brought an internal appeal within the UTU. They alleged that the implementing agreement was contrary to the terms of the March 4th Agreement. They argued, *inter alia,* that the agreement was improper because Arnett represented only employees of the acquiring company and not the Rock Island employees. They also maintained that the March 4th Agreement contemplated greater seniority rights than were provided by the February 23, 1982 implementing agreement.

The Board of Appeals held for Volkman and Kelso and, in reforming the terms of implementing agreement, stated that "all employee representatives" should participate in the negotiation of implementing agreements. *Id.* at 16. Second, the Board found that the former Rock Island employees were entitled to a seniority date as of the day they were hired by the Rock Island. Specifically, the Board stated:

> In this case of acquisition, prior rights are of paramount concern. To place a termination date on those prior rights would not only be a travesty of justice but also would contravene the very concepts of seniority and prior rights.

Id. at 18. The Board continued:

> This Board also finds the former employees should be given the seniority dates of their earliest employment date, i.e., the seniority date carried on the Rock Island. Without extensive elaboration, we feel this would not be too hard to accomplish.

Id.

c. The Arbitrator's Decision

The arbitrator issued his award in the ground service employees' dispute on May 20, 1983. Without notice of the UTU's centrally announced position in *Tucumcari* and without reference to the UTU Constitution, the arbitrator declared that the October 22, 1980 implementing agreement met the requirements of the March 4th Agreement. In his analysis of the claims of the former Rock Island employees, the arbitrator found their situation to be unfortunate. Yet, he found that the CNW employees union representatives adequately represented them. Specifically he stated:

> Full opportunity was given to all representatives of these employees to further discuss this matter with the Carrier in order to reach an implementing agreement. Unfortunately, with respect to the crafts here involved only the C&NW - UTU representative reached an understanding with the Carrier. This does not mean, however, that the UTU representatives of former Rock Island employees were not afforded the fullest opportunity to make their case with respect to the allocation of additional manpower.

Arbitration at 4.

Finally, in contravention of the clear intent of the March 4th Agreement, the UTU Constitution, and *Tucumcari,* the arbitrator declared that any notion of prior rights or dovetailing of seniority would be improper and that employees of bankrupt railroads were only entitled to limited relief.

Having set forth the factual background of the present dispute, we turn to resolving the specific legal claims of the parties.

III. JURISDICTIONAL ARGUMENTS COMMON TO ALL APPELLANTS

A. Overview

All appellants in this action assert violations of the March 4th Agreement and RITEA. With one exception, they sought redress for their grievances in federal court without first resorting to arbitration. Appellants outline several legal theories in support of federal court jurisdiction. Each is unavailing.

B. Section 105 of RITEA Does Not Create a Right of Action in Federal Court

First, the former Rock Island employees claim that Section 105 of RITEA, 45 U.S.C. § 1004, adopted May 30, 1980, creates a right of action in federal court. Section 105 states:

> (a) Each person who is an employee of the Rock Island Railroad on August 1, 1979, and who, prior to January 1, 1981, is separated or furloughed (other than for cause) from his employment with such railroad * * * as a result of a reduction of service by such railroad * * * shall, unless found to be less qualified than other applicants, have the first right of hire by any other rail carrier that is subject to regulation by the Commission for any vacancy [not covered by an affirmative action plan].

On January 13, 1983, 45 U.S.C. § 797(c)(g) was amended to subject this right to arbitration. *See* Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 235, 96 Stat. 2545, 2547 (1982). The amended statute provided:

> Any dispute, grievance or claim arising under * * * section 1004 of this title (45 U.S.C. sec. 1004) *shall be subject to resolution in accordance with the following procedures:*
>
> (1) Any employee with such a dispute grievance, or claim may petition the [the Railroad Retirement] board to review and investigate the dispute, grievance, or claim.
>
> (2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under * * * section 1004 of this title may have been violated, the dispute, grievance, or

> claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.
>
> (3) In the case of any violation of * * * section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

45 U.S.C. § 797(c)(g) (emphasis added).

Based on the foregoing, the appellants claim that the language "shall be subject to" is permissive rather than mandatory. We agree fully with the district court and find that the language of 45 U.S.C. § 797(c)(g) is clearly mandatory and that appellants' arguments in this regard are frivolous.

C. The Rock Island Employees Do Not Have a Vested Right to an Action in Federal Court

The appellants also contend that during the interim period between the date RITEA became law on May 30, 1980, and the date the right of first hire became subject to arbitration on August 13, 1983, the Rock Island employees had a vested right to bring an action in federal district court under 28 U.S.C. § 1331 that could not be eliminated by a later amendment of the law. We disagree.

The Supreme Court has clearly stated:

> [W]hen the jurisdiction of a cause depends upon a statute the repeal of the statute takes away jurisdiction. And it is equally clear, that where a jurisdiction conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring jurisdiction.

Merchants' Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 544-45 (1867).

Moreover, a closely related issue was decided in the case of *Brotherhood of Locomotive Engineers v. Burlington Northern,* 580 F. Supp. 797 (D. Colo. 1984). There the district court was faced with the issue of what happened to pending claims in federal district court after 45 U.S.C. § 797(c)(g) had been amended to require arbitration for these claims. The court, after thorough review of the authorities, found that claims brought correctly in federal court before the enactment of the arbitration provision lacked jurisdiction after its effective date.

Clearly, jurisdiction was withdrawn in the present case by the amendment of 45 U.S.C. § 797(c)(g). Appellants' case was not even properly pending in federal court at the time of the amendment. Thus, there is no conceivable basis for jurisdiction under any vested rights theory.

D. Section 122 of RITEA Does Not Create A Private Right of Action

The former Rock Island employees next contend that section 122 of RITEA creates a cause of action in federal court. We disagree.

Section 122 of the Act, 45 U.S.C. § 1017, provides:

> The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of a carrier which * * * was the subject of a proceeding pending under section 77 of the Bankruptcy Act or under subchapter IV of Chapter 11 of Title 11. The use of such tracks and facilities shall be under the terms of compensation as the carriers establish between themselves, or if the carriers are unable to

> agree under such terms of compensation as the Commission finds to be reasonable. * * *
>
> In carrying out the provisions of this section, the Commission shall require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission.

Section 105 already creates a cause of action. *See* 42 U.S.C. § 1004. It is unlikely that, without some additional special purpose, Congress intended to create a duplicative action. Moreover, the language of section 122 only authorizes the ICC to act and does not support an interpretation which would provide jurisdiction for individual suits.

In a related argument, appellants contend that section 122 and 28 U.S.C. § 1336[10] together create federal court jurisdiction over their claims. We again disagree.

Section 1336 of 28 U.S.C. permits the federal courts jurisdiction over causes of action elsewhere enumerated. It says nothing about causes of action based on alleged violations of section 122 or of ICC orders issued pursuant thereto. Moreover, the Supreme Court has repeatedly held that jurisdictional statutes such as 28 U.S.C. § 1336 do not of themselves establish a private right of action. *See*

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[10]28 U.S.C. § 1336 provides in relevant part:

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951).

E. Plaintiff's Unfair Representation Claims are Barred by the Statute of Limitations

In terms of the unfair representation claims brought by the former Rock Island employees, we agree with the district court, both in that these claims are governed by the six-month statute of limitation set forth by the Supreme Court in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983) and that all of appellants' claims are thus barred.

IV. REMEDIES AVAILABLE TO APPELLANTS

A. Overview

Given the fact that the appellants' substantive claims cannot properly be brought in federal court, we now turn to the task of determining what remedies, if any, remain available to them.

For purposes of resolving this question, the 158 individual claimants involved in the present action are best divided into three categories: March 4th Agreement appellants, non-hire appellants, and new-hire appellants.

1. The March 4th Agreement Appellants.

The March 4th Agreement appellants are thirty-three individuals hired by the CNW who claim they were not given adequate seniority under the March 4th Agreement. This group can be subdivided into two classes: the ground service employees and the engine service employees.

a. The Ground Service Employees

Nine of the thirty-three March 4th appellants were former ground service employees of Rock Island represented by the UTU. These employees were subject to the October 22, 1980 interim implementing agreement. They claimed that this implementing agreement was improper for several reasons and went to arbitration to protest its terms. Their claims were rejected by the arbitrator.

b. The Engine Service Employees

Twenty-four of the March 4th appellants were former engine service employees represented by both the UTU and the BLE. These employees were subject to two February 16, 1982 implementing agreements reached between the CNW and their respective unions. These employees, like the ground service employees, claim that the implementing agreements governing their seniority were improper. These appellants, however, did not take their protests to arbitration.

2. The Non-Hire Appellants

This group comprises eighty-one employees who applied for employment with the CNW in 1980 or 1981 for available positions but were not hired. Instead, the CNW hired persons without prior service on either the Rock Island or the CNW. This group claims they had a right to be hired both under the March 4th Agreement and section 105 of RITEA, 45 U.S.C. § 1004.

3. The New-Hire Appellants

This group is made up of forty-four former Rock Island employees taken on by the CNW as "new hires" for

work the CNW claims did not arise out of the acquisition of the Rock Island. These appellants claim a deprivation of seniority rights under the terms of the March 4th Agreement.

B. The Arbitration of the Ground Service Appellants

The March 4th ground service employees contend that the arbitration proceeding of May 20, 1983, was improper and must be vacated. We agree.

1. The Duty of Fair Representation

While labor arbitrations are entitled to great deference, if such arbitrations are so tainted with unfair or fraudulent representation that they seriously undermine the integrity of the arbitral process, they must be set aside. *Hines v. Anchor Motor Freight,* 424 U.S. 554, 567 (1976).[11] In the present case, the arbitration concerning the ground service employees was clearly so tainted and must be vacated.

In order to establish unfair representation by a union, the claimants must show that the union's representation was "perfunctory, arbitrary, discriminatory, or in bad faith." *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 47 (1979). A union representing a

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[11]An arbitration can also be set aside if its result does not draw its essence from the collective bargaining agreement. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960); *International Brotherhood of Electrical Workers, Local Union No. 53 v. Sho-Me Power Corp.,* 715 F.2d 1322 (8th Cir. 1983). Because we find that the arbitration was tainted by unfair representation, we do not consider whether it drew its essence from the collective bargaining agreement of March 4, 1980.

majority bargaining coalition owes a strict supplementary duty of fair representation to the position of a minority group within the coalition with interests adverse to the majority. In *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Supreme Court held "that the organization chosen to represent a craft is to represent all of its members, the majority as well as the minority and is to act for and not against those whom it represents." *Id.* at 202. Further, in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Court declared:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

This duty to the interests of an adverse minority is perhaps most thoroughly delineated in the case of *Jones v. Trans World Airlines*, 495 F.2d 790 (2d Cir. 1974). In *Jones*, the Second Circuit found a breach of the duty of fair representation by a union representing an adverse minority group sufficient cause to set aside the seniority provisions of a collective bargaining agreement.

In *Jones*, Trans World Airlines (TWA) entered into a collective bargaining agreement with the International Association of Machinists and Aerospace Workers International Union (IAM) in January of 1970. Prior to this time, certain employees titled "passenger relations agents" had not been asked to join a union and were not required to join a union under the union security clause in effect at that time. Moreover, prior to that time, the collective

bargaining agreement provided that all employees would hold job seniority status as of the date of their job assignment.

Under the terms of the new agreement, the work of passenger relations agents was included within the jurisdiction of the IAM in the "guards" bargaining unit. TWA and IAM further agreed that the passenger relations employees would be treated as new hires for the purpose of seniority. The effect of this was to make any IAM members who wished to transfer to the job of passenger relations agent senior to all non-IAM employees who had previously held these positions, despite the fact that the old contract fixed seniority by the date of assignment to a given job classification.

In June of 1970, TWA announced that the passenger relations jobs were guard vacancies. Twelve members of the IAM guard union bid for the jobs and were given seniority as of the date they assumed the duties of passenger relations agents, i.e. June 22, 1970. The rest of the jobs were filled by non-IAM workers who were then holding these positions. These workers were given seniority as of the dates they joined the union, generally sometime in July or August of 1970. When the new union members found out they had less seniority than the twelve newcomers to their department, they brought an action in district court claiming that the unions had unfairly represented them. The district court denied relief.

The Second Circuit reversed. The court found that the only characteristic that distinguished the new union members from the employees afforded greater seniority was the fact of union membership prior to the January

1970 collective bargaining agreement. The court termed this sort of discrimination in the negotiation of seniority "arbitrary and invidious" and found that such conduct "violate[d] the union's duty to represent fairly all members of the bargaining unit." *Id.* at 797.

The court declared that, while the standard for unfair representation generally involves arbitrary, perfunctory, or discriminatory conduct, the union must meet a higher standard when the interests of an adverse minority are affected. Specifically, the court said the union representative must provide "substantive and procedural safeguards" for the minority group.

> [I]t is evident that a union may breach its duty of fair representation by actions other than those motivated by anti-minority animus. While it is true that situations in which a union violates its duty have been identified by such phrases as "hostile discrimination," * * * and "arbitrary, discriminatory," or "bad faith" conduct, * * * these phrases do not delimit the specific categories of violations of the duty of fair representation. They only serve to emphasize that the union has broad discretion to adjust the demands of competing groups within its constituency as long as it does not act arbitrarily. * * *
>
> *In the instant case, the IAM'S duty to the appellants was broader than a mere duty not to negotiate the 1970 contract seniority provisions out of hostility toward them. The objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit.*

Id. at 798 (citations omitted and emphasis added).

The court then declared that the seniority of the former passenger relations employees should be determined as of the date of original job assignment.

In the present case, the union representatives of the CNW employees did not provide any substantive and procedural safeguards for minority members of the collective bargaining unit. Further, they failed to provide these safeguards in the face of both contractual guarantees to the contrary and repeated requests for proper process. Finally, the arbitration was tainted both because it was based on an improper implementing agreement and because it was conducted by the union in violation of its own constitution.

2. Impropriety of the October 22, 1980 Interim Implementing Agreement

The October 22, 1980 implementing agreement was negotiated by representatives of CNW employees in contravention of the terms and the purpose of the March 4th Agreement and it was thus hopelessly flawed.

The March 4th Agreement was designed to fill a practical necessity by easing the potentially troubled transition period during which the CNW acquired the Rock Island Railroad. The purpose of the March 4th Agreement was to provide the CNW labor peace in exchange for accommodation in terms of jobs and seniority for the former employees of the Rock Island Railroad. Thus, the terms of the March 4th Agreement were not a gratuitous gesture by the CNW to the former Rock Island employees, but represented "bargained-for" consideration in the truest sense of the term.

When a highly unionized rail carrier takes over the trackage of another highly unionized carrier, whether by merger or acquisition, unless assurances are made to the employees of both acquiring and acquired railroads, labor dislocation and strife is likely to be bitter and endemic. First, the employees of the acquired company face the personally devastating prospect of losing long-standing valued seniority rights and, more importantly, of losing jobs. In such a period, displaced employees are likely to force the representatives of their local and international unions into using pressure tactics to force the acquiring company into some sort of an accommodation, both in terms of rights to hire and job seniority. The acquiring companies are very susceptible to this sort of pressure, because they themselves are highly unionized—generally with the same unions as the acquired company. In addition, they are dependent on the skilled labor force which the union dominates.

The complication, however, does not end here. On the other side of the coin, the incumbent employees of the acquiring companies are likely to feel threatened by the hiring of new employees with advanced seniority rights and are likely to demand some sort of firm assurance, both in terms of their job status and vested seniority rights.

To settle these conflicts, a common and well-established practice in acquisitions or mergers is to engage in some sort of dovetailing of seniority. *See Humphrey v. Moore,* 375 U.S. 335, 347 (1964) (The integration or dovetailing of seniority is "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption."). Indeed, fed-

eral cases deciding seniority issues in acquisitions and mergers subject to the Railway Labor Act reveal that some sort of dovetailing of seniority is almost "standard practice."[12]

In terms of seniority allocation for former Rock Island employees hired by acquiring railroads, section 9 of the March 4th Agreement, in highly ambiguous terms, sets forth procedures to determine job status. Specifically, it states:

> [A]greements will be reached on each purchasing carrier concerning the manner in which seniority will be allocated in filling additional job assignments, between the purchasing carrier's employees and the bankrupt carrier employees hired by the purchasing carrier.

March 4th Agreement at 7.

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[12]*See generally Masy v. New Jersey Transit Rail Operations,* 790 F.2d 322 (3rd Cir. 1986) (in which the court endorsed the dovetailing of seniority in the wake of acquisition of bankrupt commuter railroad by a solvent railroad, the acquisition being subject to the Railway Labor Act.) In *Laturner v. Burlington Northern, Inc.,* 501 F.2d 593 (9th Cir. 1974), the Ninth Circuit found correct the dovetailing of seniority after the consolidation of the Great Northern Railroad, the Northern Pacific and three of their operating subsidiaries stating, "It has long been recognized that the use of [dovetailing] to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger [or an absorption] occurs." *Id.* at 599 (citing *Humphrey v. Moore,* 375 U.S. at 347.) *See also Freeman v. Grand International Brotherhood of Locomotive Engineers,* 375 F. Supp. 81 (S.D. Ga. 1974) and *Wheeler v. Brotherhood of Locomotive Engineers,* 324 F. Supp. 818 (D. S.C. 1971) (where the respective district courts found proper the dovetailing of employee seniority after the merger of the Seaboard Airline and the Atlantic Coastline Railroads); and *Teamsters Local No. 42 v. N.L.R.B.,* 825 F.2d 608 (1st Cir. 1987) (finding unfair representation in local union's refusal to discuss the possibility of dovetailing seniority for new union members after the consolidation of unionized and nonunionized plants.)

Carefully parsing the words of this phrase, it is difficult to determine which parties are to negotiate this agreement. Upon analysis, however, it is clear that any correct interpretation must include the representatives of the former Rock Island employees in these negotiations.

One construction would have this phrase mean that an "agreement" would be reached at a future time with regard to seniority allocation as amongst the combined groups of pre-acquisition CNW employees and former employees of the Rock Island recently employed by the CNW. This construction would not in any way specify the parties to the potential agreement and would thus leave the selection of these parties completely within the control of the CNW. Such an utter abdication of power over selecting the parties to determine seniority, however, would result in the complete loss of control over seniority allocation and thus runs contrary to the purposes of the Agreement, i.e., to protect the interests of the former Rock Island employees and to avoid labor strife in the critical transition period. Moreover, if the purpose of the agreement was to give the company the power to determine seniority, it is likely that the agreement would simply have said this.

A second construction, implicitly urged by appellees, would have this clause create a procedure whereby seniority agreements would be reached between the CNW and representatives of the CNW's unions. The text, however, does not support such a construction. Further, the March 4th Agreement was designed to protect the senior rights of former Rock Island employees. Yet, it is vital to realize that there is no group that would be less inclined to pro-

tect the seniority rights of the Rock Island employees than the representative of the CNW employees. The reason is simple. Any seniority credit given Rock Island employees for work performed while with the Rock Island would adversely affect the seniority rights of the employees of the CNW. Given this, the representatives of the CNW unions could be expected to favor the interests of the pre-acquisition employees, utterly frustrating the purposes of the agreement. Thus, this second construction could not possibly be correct.

The third and correct construction would require the implementing agreements be reached with the *active and significant participation of the representatives of the former Rock Island employees.* Strong support for this construction is found in the March 4th Agreement's purpose, to protect the interests of former Rock Island employees, in the union's constitution, and in *Tucumcari,* which, in delineating internal UTU policy, declared that all employee representatives should participate in the negotiation of implementing agreements.

3. The Arbitration Proceeding Was Improper

The ground service employee arbitration was fundamentally improper, both because the arbitrator deferred to an invalid implementing agreement and because he was not provided with information vitally relevant to his decision.

The arbitrator clearly based his decision on the October 22, 1980 interim agreement. He declared, without support from the record or any coherent reason, that the Rock Island employees had sufficient participatory rights to

ensure the implementing agreement was consistent with the March 4th Agreement. Further, he specifically deferred to the October 22, 1980 agreement, declaring both that it would be inappropriate to make a redetermination of seniority and that prior rights and dovetailing were not contemplated by the March 4th Agreement.

Next, the arbitrator made his decision without an understanding of the requirements of the union's constitution. To conform with the UTU constitution, the union should have entered the arbitration with a unified position and actively sought seniority for Rock Island employees. What happened in the ground service employees' arbitration, however, could not have been more different. The union allowed the claims of the CNW employees with regard to the allocation of seniority—a position contrary to its centrally determined seniority policy—to go unchallenged to the arbitrator. This impropriety strongly contributed to providing a legitimate forum to a position which it had previously determined illegitimate and which otherwise would probably not have prevailed.

4. Conclusion

In *Jones,* the Second Circuit found that the duty of fair representation had been violated when a union preferred long-term members' interests to those of new members. In some intuitive ways this line of conduct by the union might seem justifiable. It might be argued the union owed more loyalty to those long term members than to those employees not yet members of the union. Nevertheless, the court found this conduct to be "arbitrary" and "invidious." Further, the court delineated a clear obli-

gation to represent these future members and to assure them substantive and procedural safeguards in the contract talks.

The inherent force of *Jones* cuts powerfully in favor of the Rock Island appellants. First, the former Rock Island employees are in a stronger position to assert unfair representation than the non-union passenger relations agents in *Jones*. While, in a sense, both groups stood poised to become members of the group represented by their bargaining agent, the Rock Island employees were already members of an international charged with representing their interests. Thus, not only are the Rock Island employees owed the substantive and procedural guarantees mandated by *Jones*—protections which were clearly not provided—but additional protection arising from their membership in the international union.

In addition, the UTU in the present case offended in more grievous ways affirmative duties of fair representation clearly imposed upon them. The March 4th Agreement and *Tucumcari* required the participation of the former Rock Island employees in the negotiation of the implementing agreements. Moreover, the union's own constitution required a unified position at the arbitration. Finally, during the critical period of the transition, the UTU was actively closing down and consolidating its Rock Island union locals. This likely made it more difficult for the former Rock Island employees to understand and guard their rights and to determine whether their interests were being adequately protected by the CNW employees' representatives.

For the foregoing reasons, neither the arbitration nor the October 22, 1980 implementing agreement upon which it was based can be sustained. We, therefore, remand these cases to the district court with directions to enter an order vacating the ground service employees' arbitration. We further direct the district court to order the parties to renegotiate an implementing agreement in line with the requirements set forth in the March 4th Agreement. In these negotiations, the representatives of the Rock Island employees will participate in an *active and significant manner*. We leave it to the International to determine whether representatives of the former Rock Island employees will be necessary parties to the agreement, as its internal decision in *Tucumcari* strongly suggests, or whether they will be carefully consulted by the International prior to its negotiating the agreement.

Should the first course be chosen and the parties fail to reach a satisfactory agreement, the International shall represent both the CNW and former Rock Island employees in the arbitration that is to follow under the terms of the March 4th Agreement. Before the matter goes to arbitration, the International shall develop a unified position consistent with its constitution and internal decisions to assure adequate protection of the seniority interests of the former Rock Island employees. If the second course is chosen, the International shall similarly be directed by its constitution and internal decisions. Again, should the parties fail to reach agreement, the International shall represent both the CNW and former Rock Island employees in line with a predetermined unified position.

C. March 4th Engine Services Employees

The Newton engine service employees claim that the seniority they received under the implementing agreements of February 22, 1982, was inadequate under the terms of the March 4th Agreement. They, like the Newton ground service appellants, allege that those implementing agreements were hopelessly biased because former Rock Island employees had no role in securing them and because they were negotiated by those with interests adverse to their own. Because of this fundamental impropriety, we find the February 22, 1982 implementing agreements to be in contravention of the March 4th Agreement and, hence, invalid.

As in the case of the ground service employees, we remand these cases to the district court with directions to enter an order requiring the parties to renegotiate these agreements in accordance with the requirements eof the March 4th Agreement. We direct that these agreements be negotiated in strict accordance with section IV(B)(4) of this opinion, with representatives of the Rock Island employees participating in an *active* and *significant* manner. Moreover, should the parties fail to reach agreement, subsequent arbitration of this matter shall also be governed by section IV(B)(4) of this opinion.

D. The Non-Hire Appellants

1. Overview

The appellants in this category are former Rock Island employees who claim a right to be hired under the March 4th Agreement and Section 105 of RITEA, 45

U.S.C. § 1004. As discussed above, the March 4th Agreement provides a right of first hire in terms of work arising out of the acquisition of former Rock Island trackage. RITEA provides a sweeping right of first hire to any former Rock Island employee who is not less qualified than other applicants for any position not covered by an affirmative action plan. These appellants allege that the CNW hired a great number of new workers who were not former Rock Island employees in violation of RITEA. Further, they allege that many of these new workers were hired to work on the former trackage of the Rock Island, thus violating the March 4th Agreement.

2. The Sunsetting Provision of 45 U.S.C. § 797(c)(f)

The arbitration provision which governs the appellants' claim is 45 U.S.C. § 797(c)(g). Subsection (f) of 45 U.S.C. § 797(c) states: "The provisions of this section shall cease to be effective on the expiration of the 6-year period beginning on August 13, 1981." Based upon this sunsetting provision, appellees argue that appellants have lost their right to arbitration. Appellants, on the other hand, contend that because the statutory subdivision containing the arbitration provision has lapsed, they now have a clear and unimpeded right to an action in federal court. The theories of both parties are incorrect.

3. Arbitration is Still Available to Appellants

Upon careful examination, it is clear that Congress did not intend to phase out arbitral redress for disputes involving preferential hiring under RITEA. When the evolving structure and purpose of 45 U.S.C. § 797(c) is carefully examined, it is apparent that the sunsetting pro-

vision of that section was intended to eliminate the Central Register of Railroad Employment administered by the Railroad Retirement Board (RRB) and not to cut off the right to arbitration for disputes concerning preferential hiring.[13]

45 U.S.C. § 797, which corresponds to Title VII of the Northeast Rail Service Act of 1981, Pub. L. No. 97-35, 95 Stat. 643 (1981) (NRSA), was a part of the massive Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (OBRA) designed, at least at the outset, to drastically reduce the size and commitments of the federal government.

Title VII, part of the effort to privatize the failing Conrail, allowed the railroad to end onerous protective obligations that had been established by Title V of the Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1973). Specifically, Title VII allowed the railroad to terminate some employees or employee benefits in exchange for specified cash payments.

Part of the transition that was accomplished by Title VII involved the creation of a central register of displaced railroad employees. The register was to be of limited duration and was designed to assist employees in securing their preferential hiring rights. *See* NRSA § 704, 45 U.S.C. § 797(c). As originally introduced in Congress,

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[13]Moreover, even had Congress intended to eliminate arbitration for disputes concerning preferential hiring, it might well be considered fundamentally unfair to withdraw the arbitral remedy from those claims already pending in federal court on August 13, 1987. *Cf. Ralpho v. Bell,* 569 F.2d 607 (D.C. Cir. 1977).

§ 797(c) contained only the provisions found in subsections now codified (a) through (f). *See* H.R. 3488, 97th Cong., 1st Sess. § 303 (introduced May 5, 1981); S. 1377, 97th Cong., 1st Sess. §§ 413-4 (introduced June 7, 1981). Subsections (a) through (e) required the RRB to maintain a central register of displaced railroad employees to facilitate their reemployment and to assist in the implementation of preferential hiring rights. Subsection (f) was the sunset provision which allowed the RRB to end the registration apparatus within a reasonable time after the employee terminations allowed by NRSA.

It is important to note that subsection (g) of § 797(c), the arbitration provision at the heart of the present controversy, was not a coherent part of the legislative scheme of the original § 797(c), but only a last minute afterthought added later in conference. *See* H.R. Conf. Rep. No. 97-208, Book 1, 1st. Sess., 329-30 (1981). It must be remembered that OBRA itself has long been noted for the vast legislative confusion engendered and the significant number of drafting oversights and errors that occurred as it wended its way through the Congress. Given this background, it is likely that any implication that Congress intended the right to arbitration for preferential hiring to end with this sunsetting provision was inadvertent.

This likelihood of inadvertency becomes a certainty when one examines the internal structure of Title VII. Title VII addresses a broad range of issues affected by the NRSA.[14] With only a few exceptions, it subjects dis-

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[14] *E.g.*, negotiation of protection agreements (§ 797); termination allowances (§ 797(a)); preferential hiring (§ 797(b));

(Continued on following page)

putes concerning these various topics to resolution under § 714, 45 U.S.C. § 797(m), which provides for arbitration by an adjustment board under § 3 of the Railway Labor Act, 45 U.S.C. § 153. Section 714 has no sunset provision.

The right to preferential hire was one of the few exceptions to arbitration under § 797(m), largely because the right to preferential hire was initially related to the central register maintained by the RRB. The only substantive difference between § 797(c)(g), the arbitration provision at issue here, and § 797(m) is that the former subjects the right to arbitration to a preliminary screening by the RRB, the board charged with maintaining the central register. The substantive arbitration of both types of disputes is eventually accomplished by an adjustment board under 45 U.S.C. § 153. While the central register was in existence, it certainly made sense to subject preferential hiring claims to a preliminary screening by the RRB, which would be likely to have all the relevant information concerning these claims close at hand. Yet, the Congress could not have intended to cut off the right to arbitration completely to employees who had preferential hiring claims when the central register ceased to exist, particularly when arbitration was still available to those asserting grievances under almost all the other topic areas covered by Title VII.

(Continued from previous page)

maintenance of a central register of railroad employment (§ 797(c)); election and treatment of benefits (§ 797(d)); arrangement of work (§ 797(e)); contracting out (§ 797(f)); new collective bargaining agreements (§ 797(g)); employee and personal injury claims (§ 797(h)); limitation on liability (§ 797(i)); preemption (§ 797(h)); factfinding panels regarding certain collective bargaining issues (§ 797(i)); and arbitration of disputes (§ 797(m)).

We, therefore, find, as a matter of statutory interpretation, that the sunsetting provision of 45 U.S.C. § 797(c) only applies to the maintenance of the Central Register of Employees required under Title VII and that claims involving preferential hiring of former Rock Island employees with the CNW remain subject to arbitration by an adjustment board under § 3 of the Railway Labor Act, 45 U.S.C. § 153.

4. Conclusion

a. Specific Remedy to Non-Hire Appellants

Given the fact that the right to arbitration under 45 U.S.C. § 797(c)(g) still is open to appellants, we remand to the district court with directions to send the disputes under RITEA to be resolved by an adjustment board under section 3 of the Railway Labor Act. Moreover, the adjustment board should, at the same time, consider appellants' claims arising under the March 4th Agreement.

b. Laches

Because neither RITEA nor the March 4th Agreement has any specific period of limitations, we leave to the arbitrator the question of whether the claims of the non-hire appellants are barred by laches.

In deciding this issue, the arbitrator is directed to take into account the following factors. First, the arbitrator should consider the delay in seeking redress caused by the closing of the Rock Island locals by various internationals. In this regard, the arbitrator should determine whether the former Rock Island employees were adequately informed of their rights under RITEA and the March 4th

Agreement. Specifically, he should determine whether there were false assurances made by union representatives to the effect that Rock Island grievances would be redressed and the effect such assurances might have had in delaying action by the Rock Island employees.

Second, the arbitrator should take into account the cumulative effect of the serious unfair representation by the internationals in terms of the March 4th appellants. Not only did the unions act unfairly in the negotiation of the implementation agreements but they also did not properly represent the former Rock Island employees in the arbitration. This unfairness by the internationals to the March 4th appellants may have convinced the non-hire appellants that it would be futile to process their claims through conventional channels because they believed they could not rely on their union representatives to adequately represent their interests.

E. The New-Hire Appellants

A fourth group of claimants are the new-hire appellants. These appellants were hired by the Rock Island after its acquisition by the CNW. They received no seniority and contend that their rights were violated under the March 4th Agreement. The CNW contends that the jobs the new hire appellants received did not arise out of the work related to the Rock Island acquisition, and thus they were not deserving of any seniority under the March 4th Agreement. Clearly, if the work did not arise directly from the Rock Island acquisition, the CNW is correct.

These new-hire appellants have the right to have their claims submitted to a neutral arbitrator to determine

whether the jobs they received arose from the acquisition and, if they did, what seniority rights are due these appellants. Appellants' claims are, of course, subject to the defense of laches. In determining whether appellants' claims are barred by laches, the arbitrator should take into account all those factors listed in section IV(D)(4)(b) of this opinion.

V. CONCLUSION

This matter is remanded to the district court for action consistent with this opinion. Each party will bear its own costs on appeal. The mandate of this Court shall issue forthwith.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1369/70/72/73/
74/86-1950 and 87-1325SI

L. Lee Beardsly,	)	
	)	
Appellant,	)	
	)	Appeals from the
vs.	)	United States
	)	District Court for
Chicago & North Western Transportation Company, et al.,	)	the Southern
	)	District of Iowa.
	)	
	)	
Appellees.	)	

Appellees' petitions for rehearing en banc have been considered by the Court and are denied.

Hon. C. Arlen Beam recused himself.

Petitions for rehearing by the panel are also denied.

September 14, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain, per CD
Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

(Filed April 16, 1985)

JOHN E. REECE, et al.,	)	
	)	
Plaintiffs,	)	CIVIL
	)	NO. 83-640-B
v.	)	
	)	MEMORANDUM
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	OPINION, RULING AND ORDER
	)	
Defendants.	)	

There is before the court for ruling the motion of defendant Chicago and Northwestern Transportation Company (hereinafter CNW) to dismiss[1] or, in the alternative, for summary judgment.

Plaintiffs are former employees of the Chicago, Rock Island and Pacific Railroad Company (hereinafter Rock Island). CNW is the purchaser of certain segments of the Rock Island. Defendant United Transportation Union (hereinafter UTU) is the certified collective bargaining representative of CNW's ground service employees. Defendant Brotherhood of Locomotive Engineers (hereinafter BLE) is the certified collective bargaining representative of CNW's engine service employees when they are working as engineers. The United Transportation Union (Enginemen) (hereinafter UTU-E), a division of defendant UTU, is the certified collective bargaining represen-

tative of CNW's engine service employees when they are working as firemen or hostlers.

The complaint alleges violations of a contract entered into on March 4, 1980, violations of the Rock Island Railroad Transition and Employees' Assistance Act, 45 U.S.C. § 1001, et seq. (hereinafter Rock Island Act), and violations of the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 et seq.

BACKGROUND

The case has its origins in the bankruptcy of the Rock Island. In September, 1979, the Interstate Commerce Commission (hereinafter I.C.C.) concluded that the Rock Island had run out of cash making its continuing operation impossible in the face of national transportation requirements. The Rock Island ceased operations on September 21, 1979. Certain rail carriers were ordered pursuant to law to provide temporary service on the Rock Island Lines under the directed service provisions of the I.C.C. Act, 49 U.S.C. § 11125.

On March 4, 1980, thirteen railroads, including the CNW, and fifteen railroad unions, including the defendant unions, entered into an agreement known as the "March 4th Agreement," which recited, among other things, that its purpose was to provide a "fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner."

The March 4th Agreement provides, among other things, that:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over . . . Rock Island . . . Lines.

The Agreement further provides:

> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order to the Rock Island . . . the first right of hire respectively.

On March 18, 1980, the I.C.C. authorized CNW to operate on a portion of the lines of the Rock Island which had ceased operations. Later the CNW became "purchasing carrier" of certain railroad lines of the Rock Island as that term is defined in Article I, § 1(a) of the March 4th Agreement.

The Rock Island Act was signed into law by the President on May 30, 1980. Provisions which are relevant provide a first right of hire for Rock Island employees by other rail carriers, Section 105, 45 U.S.C. § 1004, and a requirement that the I.C.C., in allowing an operator to temporarily operate over any Rock Island Lines, must require that the operator use, to the maximum extent practicable, those former Rock Island employees who had provided service over those lines for the Rock Island, Section 122, 45 U.S.C. § 1017.

Plaintiffs formerly worked for the Rock Island on lines acquired by CNW as purchasing carrier. They were not hired by CNW.

PLAINTIFFS' SECTION 105 CLAIMS

Plaintiffs assert claims under section 105 of the Rock Island Act, 45 U.S.C. § 1004. The CNW contends that 45 U.S.C. § 797c(g) gives administrative tribunals exclusive jurisdiction over such claims and therefore deprives the court of subject matter jurisdiction over plaintiffs' section 105 claims.

Plaintiffs do not dispute that 45 U.S.C. § 797c(g) applies to their section 105 claims. That statute expressly provides that "[a]ny dispute, grievance, or claim arising under" section 105 of the Rock Island Act (as well as two other preferential hiring statutes) "shall be subject to resolution in accordance with" a prescribed two-step dispute resolution process. The first step prescribed is for a claimant to petition the Railroad Retirement Board to investigate his claim [45 U.S.C. §797c(g)(1)]; the second step, if the Retirement Board determines that section 105 "may have been violated," is for the claimant to submit his claim to an adjustment board established under the Railway Labor Act [45 U.S.C. § 797c(g)(2)]. The sole issue for the court, therefore, is whether these prescribed procedures are mandatory, as the CNW contends, or permissive, as plaintiffs contend.

In *Brotherhood of Locomotive Engineers v. Burlington Northern, Inc.*, 580 F. Supp. 797 (D. Colo. 1984), the court held that 45 U.S.C. § 797c(g) requires the dismissal of preferential hiring claims for lack of subject matter jurisdiction. This court agrees. The dispute resolution procedures prescribed by 45 U.S.C. § 797c(g) are mandatory. The key language of that statute—"shall be subject to resolution in accordance with"—is unambiguous and plain-

ly mandatory. This language cannot reasonably be interpreted to give claimants a choice between following the prescribed administrative procedures or coming to court. Accordingly, the plaintiffs' section 105 claims must be dismissed.

PLAINTIFFS' SECTION 122 CLAIMS

The second statutory claim asserted by plaintiffs is based on section 122 of the Rock Island Act, 45 U.S.C. § 1017. The CNW contends that this statute creates no private right of action and, therefore, that plaintiffs have not stated a claim against the CNW based on this statute. The CNW also contends that even if plaintiffs could assert a damage claim against it for an alleged violation of section 122, such a claim, like plaintiffs' section 105 claim, would be subject to exclusive jurisdiction of administrative tribunals and therefore would be outside this court's subject matter jurisdiction.

Section 122 is not a directive or prohibition addressed to any private party. It merely directs the I.C.C., in authorizing carriers to conduct temporary operations over former Rock Island lines, to "require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission." It neither expressly grants nor denies a private cause of action, and, therefore, the "ultimate issue . . . is whether Congress intended to authorize the implied cause of action asserted in this case." *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 821 (S.D. Ia. 1982).

In ascertaining congressional intent, courts first look to the language of the statute. Section 122 does not speak

in terms of "rights" provided to former Rock Island employees. It thus stands in sharp contrast to section 105 of the same statute, which expressly provides former Rock Island employees with a "first *right* of hire." Nor does section 122 direct private parties, such as the CNW, to act in a particular way. Rather, it is phrased as a directive to the I.C.C. As the Supreme Court held in *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754 (1981), such a "command to a federal agency" provides "no support for the implication of a private remedy." *Id.* at 772-73.

Courts next look to the legislative history of the statute to see if it contains an indication that Congress intended the statute to be enforceable by a private right of action. Plaintiffs identify no legislative history supporting a private right of action in this case. At most, therefore, the legislative history of the Rock Island Act is silent on the question of private enforcement of section 122.

Under these circumstances, it is clear that section 122 is not enforceable by a private right of action. As the Supreme Court stated in *Touche Ross & Co. v. Redington, Trustee*, 442 U.S. 560, 571 (1979), "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." In that case, like this one, the statute "by its terms grant[ed] no private rights to any identifiable class and proscribe[d] no conduct as unlawful," and the legislative history "simply [did] not speak to the issue of private remedies." *Id.* at 576.

The court concludes that section 122 does not create a private right of action, and plaintiffs' claims under that statute must be dismissed.[2]

The foregoing being dispositive of plaintiffs' section 122 claims, the court does not address CNW's alternative contention that exclusive jurisdiction rests with administrative tribunals.

PLAINTIFFS' CONTRACT CLAIMS

Plaintiffs contend that the March 4th Agreement gave them a right to be hired by the CNW and the CNW breached that agreement by not hiring them. Plaintiffs assert that the CNW did not comply with sections 2 and 3 of Article II of the agreement, which require railroads purchasing Rock Island lines to hire former Rock Island employees in seniority order to fill the "necessary additional manpower requirements" determined by the purchasing railroad to be "due to its taking over those Rock Island . . . Lines." The CNW contends that this breach of contract claim is subject to the exclusive jurisdiction of adjustment boards under the Railway Labor Act, and that the court should dismiss this claim for lack of subject matter jurisdiction.

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i), vests adjustment boards with exclusive jurisdiction over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." Courts therefore have no subject matter jurisdiction over such disputes. See *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Landfried v. Terminal Railroad Association of St. Louis*, 721 F.2d 254, 255 (8th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3720 (1984).

The March 4th Agreement deals with such matters as seniority, compensation guarantees, and discharge. It therefore concerns "rates of pay, rules, [and] working conditions." This is clear not only from the coverage of the agreement itself, but also from the decisions of the United States Court of Appeals for this circuit with respect to agreements concerning such matters in *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977) and in *United Transportation Union-E v. Burlington Northern, Inc.*, 470 F.2d 813 (8th Cir. 1972). The Eighth Circuit determined in both of these cases that adjustment boards had jurisdiction over disputes concerning labor protective agreements which, like the March 4th Agreement, established the terms pursuant to which railroads' work forces would be consolidated.

Plaintiffs' contract claim turns on the "interpretation or application" of the March 4th Agreement, and therefore it is the type of dispute that the Railway Labor Act subjects to the exclusive jurisdiction of adjustment boards. Accordingly, plaintiffs' contract claim will be dismissed for lack of subject matter jurisdiction.[3]

PLAINTIFFS' UNFAIR REPRESENTATION CLAIM

Plaintiffs' final claim is that their unions breached their duty of fair representation by failing to enforce their alleged rights under the Rock Island Act and the March 4th Agreement, and that the CNW conspired or participated in the breach by negotiating with the defendant unions in bad faith. The CNW moves to dismiss this claim for failure to state a claim against it.

To state a claim for unfair representation against an employer, a plaintiff first must plead "good faith allegations and facts supporting those allegations indicating collusion or otherwise tying the railroad and the union together" in "denying the employee [his] rights under the contract and the Railway Labor Act." *Raus v. Brotherhood of Railway Carmen,* 663 F.2d 791, 798 (8th Cir. 1981).

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the Supreme Court articulated the test as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236.

I believe that plaintiffs' unfair representation claim against the CNW is pleaded sufficiently to withstand the CNW's motion to dismiss.

RULING AND ORDER

The CNW's motion is granted as to the section 105 claims, the section 122 claims, and the contract claims, and it is ordered that those claims be dismissed.

The CNW's motion is denied as to the unfair representation claims.

DATED this 16th day of April, 1985.

/s/ Harold D. Vietor
HAROLD D. VIETOR
United States District Judge

FOOTNOTES

[1]The motion was filed after CNW answered the complaint, so technically it is a motion for judgment on the pleadings rather than a motion to dismiss. Fed. R. Civ. P. 12(b) and (c).

[2]Plaintiffs also contend that 28 USC § 1336 gives them the right to sue for damages for alleged violations of I.C.C. orders issued pursuant to section 122. Section 1336 of Title 28 is merely a jurisdictional statute: it permits the federal courts to exercise subject matter jurisdiction over causes of action authorized by other statutes but does not itself authorize a private right of action for damages.

[3]Plaintiffs contend that section 3 First (i) is not applicable to their claims because they are not CNW employees. Section 3 First (i) applied to disputes between any railroad "employee" and a "carrier or carriers." Section 1 Fifth of the Act, 45 U.S.C. § 151 Fifth, defines "employee" as "every person in the service of a carrier." Because plaintiffs remain Rock Island employees for purposes of the March 4th Agreement [Art. II, § 7, Pl. Br. 51], they are "employees" within the meaning of the Railway Labor Act, including section 3 First (i). Their claims against the CNW are therefore subject to the jurisdiction of adjustment boards even though they are not CNW employees. *See Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, 499 F. Supp. 967 (E.D. Pa. 1980) (dispute between D&H Employee and Conrail held subject to adjustment board jurisdiction).

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

VANE NEWTON, et al.,	) CIVIL NO.
	) 83-641-D
Plaintiffs,	)
	) MEMORANDUM
v.	) OPINION,
	) RULINGS AND
CHICAGO AND NORTH	) ORDER
WESTERN TRANSPORTA-	)
TION COMPANY, et al.,	) (Filed April
	) 16, 1985)
Defendants.	)

There is before the court for ruling the motion of defendant Chicago and Northwestern Transportation Company (hereinafter CNW) for summary judgment, or, in the alternative, to dismiss.[1]

Plaintiffs are former ground service and engine service employees of the Chicago, Rock Island and Pacific Railroad Company (hereinafter Rock Island). CNW is the purchaser of certain segments of the Rock Island. Defendant United Transportation Union (hereinafter UTU) is the certified collective bargaining representative of CNW's ground service employees. Defendant Brotherhood of Locomotive Engineers (hereinafter BLE) is the certified collective bargaining representative of CNW's engine service employees when they are working as engineers. The United Transportation Union (Enginemen) (hereinafter UTU-E), a division of defendant UTU, is the certified collective bargaining representative of CNW's engine service employees when they are working as firemen or hostlers.

The complaint alleges violations of a contract entered into on March 4, 1980, violations of the Rock Island Railroad Transition and Employees' Assistance Act, 45 U.S.C. § 1001, et seq. (hereinafter Rock Island Act), and violations of the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 et seq.

BACKGROUND

The case has its origins in the bankruptcy of the Rock Island. In September, 1979, the Interstate Commerce Commission (hereinafter I.C.C.) concluded that the Rock Island had run out of cash making its continuing operation impossible in the face of national transportation requirements. The Rock Island ceased operations on September 21, 1979. Certain rail carriers were ordered pursuant to law to provide temporary service on the Rock Island Lines under the directed service provisions of the I.C.C. Act, 49 U.S.C. § 11125.

On March 4, 1980, thirteen railroads, including the CNW, and fifteen railroad unions, including the defendant unions, entered into an agreement known as the "March 4th Agreement," which recited, among other things, that its purpose was to provide a "fair, equitable and complete arrangement for protection of . . . Rock Island employees taken into the employ of interim service operators and purchasing carriers signatory hereto and to enable the interim service operator or purchasing carrier to be operated in the most efficient manner . . ."

The March 4th Agreement provides, among other things, that:

> A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over . . . Rock Island . . . Lines.

The Agreement further provides:

> As a carrier determines its need for additional employees under this Article, it shall allow eligible employees in seniority order on the Rock Island . . . the first right of hire respectively.

On March 18, 1980, the I.C.C. authorized CNW to operate on a portion of the lines of the Rock Island which had ceased operations. Later the CNW became "purchasing carrier" of certain railroad lines of the Rock Island as that term is defined in Article I, § 1(a) of the March 4th Agreement.

The Rock Island Act was signed into law by the President on May 30, 1980. Provisions which are relevant provide a first right of hire for Rock Island employees by other rail carriers, Section 105, 45 U.S.C. § 1004, and a requirement that the I.C.C., in allowing an operator to temporarily operate over any Rock Island Lines, must require that the operator use, to the maximum extent practicable, those former Rock Island employees who had provided service over those lines for the Rock Island, Section 122, 45 U.S.C. § 1017.

The plaintiffs are former ground service and engine service employees of the Rock Island. After the Rock Island ceased operations, the plaintiffs were hired by the CNW pursuant to the March 4th Agreement. Article II, § 9 of the agreement directs carriers that hire former Rock Island employees pursuant to its provisions to negotiate with employee representatives "concerning the manner

in which seniority will be allocated" between employees of the carrier and the hired former Rock Island employees "in filling addtional job assignments." It further provides that if an agreement allocating seniority is not reached, the matter is subject to binding arbitration.

After plaintiffs were hired, negotiations took place between the CNW and the unions representing the plaintiffs in an effort to reach an agreement allocating seniority between the Rock Island employees hired by the CNW and the CNW's other employees. In the case of the ground service plaintiffs (conductors, trainmen, and switchmen), who were represented by the defendant UTU, an agreement acceptable to both the CNW employees' representatives and the former Rock Island employees' representatives was not reached. Accordingly, the UTU submitted the dispute over the seniority arrangements for the former Rock Island ground employees to binding arbitration pursuant to Article II, § 9(b) of the March 4th Agreement. The arbitrator, appointed by the National Mediation Board, issued his decision on May 20, 1983. In the case of the engine service plaintiffs (engineers, firemen, and hostlers), who were represented by the defendant BLE and by the UTU-E, implementing agreements allocating the former Rock Island employees seniority were executed by the unions and the CNW on February 16, 1982.

PLAINTIFFS' CLAIMS

The ground service plaintiffs contend they should have received better seniority arrangements than were awarded by the federally appointed arbitrator. Similarly, the engine service plaintiffs contend that they should have re-

ceived better seniority arrangements than were agreed to by their unions and the CNW. Both sets of plaintiffs assert that their unions breached their duty of fair representation and that if the unions had represented them fairly, they would have received better seniority arrangements. Plaintiffs seek damages from the union defendants. In addition, plaintiffs assert that the CNW participated in this alleged unfair representaton and, therefore, that it too should be liable for damages.[2]

ADEQUACY OF CLAIMS

The CNW moves to dismiss and for summary judgment contending that plaintiffs' allegations are inadequate to state claims of breach of duty of fair representation and that undisputed facts conclusively establish that plaintiffs cannot prove unfair representation by the unions or participation in any unfair representation by the CNW.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the Supreme Court articulated the test as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of

> jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236.

Summary judgment should not be granted unless the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The drastic nature of the summary judgment places a burden on the defendant to establish, with such clarity as to leave no room for controversy, that the plaintiffs are not entitled to recover under any circumstances. *Champale, Inc. v. Joseph S. Pickett & Sons, Inc.*, 599 F.2d 857, 859 (8th Cir. 1979). The evidence must be viewed in the light most favorable to the party opposing the motion. *Id.*

Although the record presented may lead one to think it unlikely that either the ground service plaintiffs or the engine service plaintiffs will ultimately prevail against the CNW on their unfair representation claims, this court cannot conclude that the record establishes with such clarity as to leave no room for controversy that plaintiffs are not entitled to recover under any circumstances.

STATUTE OF LIMITATIONS

The CNW also moves for summary judgment in respect to the claims of the engine service plaintiffs on the ground that their claims are barred by the applicable statute of limitations.

The limitations period that governs plaintiffs' claims is six months. Section 10(b), National Labor Relations

Act, 29 U.S.C. § 160(b) (1973). The Supreme Court determined this to be the appropriate limitations period for unfair representation claims under the National Labor Relations Act in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), and the United States Court of Appeals for this Circuit has held that this six-month limitations period is to be applied retroactively, *Lincoln v. District 9,* 723 F.2d 627, 630 (8th Cir. 1983), and it applies to unfair representation claims, like plaintiffs', that are brought under the Railway Labor Act. *Hunt v. Missouri Pacific Railroad Co.,* 729 F.2d 579, 581 (8th Cir. 1984). Accordingly, since the complaint in this case was filed on November 18, 1983, plaintiffs' claims are barred if their cause of action accrued more than six months earlier—*i.e.,* prior to May 18, 1983.

The question of when an unfair representation cause of action accrues is a matter of federal law. See *Gatlin v. Missouri Pacific Railroad Co.,* 631 F.2d 551, 554 (8th Cir. 1980); *Butler v. Local Union 823, International Brotherhood of Teamsters,* 514 F.2d 442, 448-49 (8th Cir. 1974), *cert. denied,* 423 U.S. 924 (1975). Under federal law, plaintiffs' claim accrued on February 16, 1982, 21 months before this suit was filed. This is because (a) the injury about which plaintiffs complain—the allegedly disadvantageous allocation of seniority—became "fixed and reasonably certain" at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. See *Hafer v. Air Line Pilots Association,* 525 F. Supp. 874, 877 (D. Hawaii 1981), *aff'd,* 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association,* 609 F.2d 934 (9th Cir. 1979), *cert. denied,* 446 U.S. 953 (1980).

Plaintiffs seek to avoid the bar of limitations by asserting that the so-called "discovery rule" applies and that they did not discover the existence of their cause of action until after May 18, 1983, because "they have only recently discovered the wrongful acts of the Defendant Unions and . . . much of the wrongful conduct has only been discovered within 6 months of the filing of this litigation." [Pl. Br. 56.] Specifically, they assert that they discovered only recently that (a) the February 16, 1982 agreements "were apparently not ratified or executed in accordance with" the unions' constitution, (b) the defendants acted to exclude appropriate Rock Island representatives from the implementing agreement negotiations and otherwise failed to follow procedures prescribed by the unions' constitutions, and (c) plaintiffs' locals were wrongfully closed. [Pl. Br. 56-57]. The court holds that even if the discovery rule applies to plaintiffs' challenge to the February 16, 1982 implementing agreements, their cause of action nevertheless accrued prior to May 18, 1983.

It is the knowledge of injury and its immediate cause that starts the running of a limitations period under the discovery rule, not the knowledge of whether that injury is legally actionable. E.g., *United States v. Kubrick,* 444 U.S. 111 (1979); *Dyniewicz v. United States,* 742 F.2d 484, 486-87 (9th Cir. 1984). Thus, a cause of action challenging a seniority agreement accrues under the discovery rule when the plaintiffs know or should have discovered the terms of the agreement. *Benson v. General Motors Corp.,* 716 F.2d 862, 864 (11th Cir. 1983). See also *Farr v. H. K. Porter Co.,* 747 F.2d 502, 505-06 (5th Cir. 1984). Plaintiffs do not contend that they failed to discover the existence of

the February 16, 1982 agreements and their effect on plaintiffs' seniority during the 15 months between the signing of those agreements and May 18, 1983. Their challenge to the February 16, 1982 agreements is therefore time-barred regardless of when they discovered the particular facts upon which they base their unfair representation claim.

Moreover, plaintiffs' unfair representation claim is time-barred even under their interpretation of the discovery rule. For plaintiff's claim to be timely under their own theory, they would have to show not merely that they did not discover the particular wrongful union acts until after May 18, 1983; they would have to show also that they exercised due diligence within the six months after they learned about the seniority arrangements established by the February 16, 1982 agreements. Plaintiffs have failed to make such a showing. None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983.

Alternatively, plaintiffs seek to avoid the bar of limitations by asserting that the running of the limitations period was postponed until after May 18, 1983 because of "fraudulent concealment" by the unions. The court finds that plaintiffs have failed to show that this tolling doctrine applies to their claims for three reasons.

First, as with the "discovery rule," a plaintiff is entitled to the benefit of the "fraudulent concealment" doctrine only if he demonstrates that during the limitations period he exercised due diligence to discover the existence of his cause of action and that, despite this due diligence, he failed to discover the cause of action within the limitations period. See, *e.g., Campbell v. The Upjohn Co.,* 676 F.2d 1122, 1126-27 (6th Cir. 1982). Plaintiffs' affidavits fail to demonstrate the exercise of due diligence prior to May 18, 1983.

Second, even a plaintiff who has exercised "due diligence" can benefit from the "fraudulent concealment" doctrine only if during the limitations period the defendant has wrongfully concealed from the plaintiff facts underlying the plaintiff's cause of action. See, *e.g., Campbell v. The Upjohn Co., supra,* 676 F.2d at 1126. Neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW. Silence or passive conduct is not sufficient to toll the running of the limitations period. See *Dyniewicz v. United States, supra,* 742 F.2d at 487; *Woollett v. Bankers Life Co.,* 572 F. Supp. 650, 658 (E. D. Mich. 1983).

Third, plaintiffs have not alleged any concealment, active or passive, by the CNW. Accordingly, even if the statute could be tolled as to plaintiffs' claims against the unions, plaintiffs have failed to demonstrate that it should be tolled as to their claims against the CNW.

RULINGS AND ORDER

The CNW's motion for summary judgment is denied as to the ground service plaintiffs and is sustained, only

on the statute of limitations ground, as to the engine service plaintiffs.

The CNW's alternative motion to dismiss is denied.

It is ordered that plaintiffs' counsel shall promptly certify to the clerk of this court the names of the engine service plaintiffs and the clerk shall then enter judgment of dismissal in favor of defendant CNW and against those engine service plaintiffs.

DATED this 16th day of April, 1985.

/s/ Harold D. Vietor
HAROLD D. VIETOR
United States District Judge

FOOTNOTES

[1]The motion was filed after CNW answered the complaint, so technically it is a motion for judgment on the pleadings rather than a motion to dismiss. Fed. R. Civ. P. 12(b) and (c).

[2]While paragraph 18 of the complaint alleges that the CNW breached the March 4th Agreement by not "recogniz[ing] their previous seniority standing," plaintiffs have apparently dropped this claim. [See Pl. Br. 7, 9.] In any event, the March 4th Agreement does not require seniority to be allocated in any particular manner. Accordingly, plaintiffs have not stated a claim against the CNW for breach of the March 4th Agreement.

Plaintiffs also assert that the CNW violated section 122 of the Rock Island Act, 45 U.S.C. § 1017, by not recognizing their Rock Island seniority during the period it was operating under temporary I.C.C. authority. This allegation fails to state a claim against the CNW both because section 122 says nothing about seniority and because section 122 is not enforceable by a private right of action. *Reece v. Chicago and Northwestern Transportation Company,* Civil No. 83-640-B (S.D. Ia.) Ruling, April 16, 1985.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

(Filed February 19, 1986)

VANE NEWTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL
v.	)	NO. 83-641-D
	)	
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	RULINGS AND ORDERS
	)	
Defendants.	)	

JOHN E. REECE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL
	)	NO. 83-640-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

JACK L. CHAMBERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL
	)	NO. 84-79-B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

ROGER SWIFT, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-80-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

HAROLD L. KING, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-81-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

ANGELINE V. BOLL, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-82-B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	
JAMES L. VAN DEE, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL
	)	NO. 84-83-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

There are numerous motions in these related cases submitted after oral arguments on December 6, 1985. On April 18, 1984, this court ruled on several motions in *Reece* and *Newton,* and in a companion case, *Diltz v. Chicago and North Western Transportation Company, et al.,* Civil No. 83-642-B. The issues in the present set of motions are to a large extent controlled by the legal conclusions in those earlier rulings. Plaintiffs, who are represented by the same attorney, argue that this court should overrule its prior conclusions. The court is not inclined to do so, and the legal conclusions previously reached in *Reece, Newton,* and *Diltz* are reaffirmed.

All motions directed at claims based on section 105 of the Rock Island Act, 45 U.S.C. § 1004; claims based on section 122 of the Rock Island Act, 45 U.S.C. § 1017; and claims based on the March 4th, 1980, Agreement will be

granted and those claims dismissed. *See Reece,* slip op. at 3-7 (April 16, 1985).

The court has considered the individual situation of each plaintiff against whom the statute of limitation defense is directed and finds that all claims arose more than six months before the filing of the complaints. All motions based on the applicable six month statute of limitations will be granted and the corresponding unfair representation claims dismissed.[1] *See Newton,* slip op. at 5-9 (April 16, 1985); *Engelhardt v. Consolidated Rail Corp.,* 756 F.2d 1368 (2nd Cir. 1985); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.,* 756 F.2d 1262 (7th Cir. 1985); *Metz v. Tootsie Roll Industries, Inc.,* 715 F.2d 299 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 976 (1984).

At oral argument plaintiffs' counsel acknowledged that as to the statute of limitations defense most of the plaintiffs in these cases are essentially in the same position as the plaintiffs in *Newton.* In resistance to the motions for summary judgment only plaintiffs Stowe and Tollakson in *Boll* rely on evidentiary material to dispute or supplement the undisputed facts as submitted by defendants. As with the other plaintiffs, the court has consid-

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[1]At oral argument defendant Chicago and North Western Transportation Company (CNW) joined in defendant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees' statute of limitations motion as to plaintiff Stowe in the *Boll* case. Defendant CNW asserted their statute of limitations defense as to plaintiff Tollakson in *Boll* and plaintiff Van Dee in *Van Dee* in a motion for judgment on the pleadings. Normally a statute of limitations defense is raised by motion for summary judgment; however, the court will consider CNW's motion in connection with the motions for summary judgment submitted by other defendants as to these same plaintiffs.

ered plaintiff Stowe's situation[2] and plaintiff Tollakson's situation[3] and determined that their claims are barred by the six months statute of limitations.

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[2]Plaintiff Stowe was informed of his seniority date change on August 19, 1982. His claim accrued at the latest after he received the June 10, 1983, letter. Plaintiff Stowe's argues that the refusal to act contained in the October 4, 1983, letter should be the basis for determining the commencement of the statute of limitations period. This argument is rejected. The commencement of the statute of limitations cannot be delayed or restarted by a plaintiff sending letters to the union after the union has indicated that the matter has been concluded.

[3]Plaintiff Tollakson was not hired under the March 4, 1980, agreement but was hired as a temporary employee on April 3, 1980, and discharged on September 6, 1980. He continued to communicate with BRAC concerning employment with CNW during 1981. In late 1981 he telephoned BRAC and said that he was filing a complaint against CNW and BRAC with the Iowa Commission for Human Rights. At that time he was advised that BRAC could do nothing further for him. Plaintiff asserts by deposition that during phone conversations in 1981 he was led to believe that a formal claim would be filed, but that BRAC would never tell him of or send him any copies of any action being taken on his behalf. He also asserts in deposition that he thought a claim had been filed. Plaintiff does not dispute that he never specifically requested that BRAC file a claim on his behalf nor does plaintiff assert that BRAC ever specifically stated that a formal claim had been filed. No communication between BRAC and plaintiff Tollakson is asserted to have occurred during 1982 or 1983 until plaintiff sent a letter to BRAC and BRAC responded with a letter dated September 27, 1983, stating in part, "in addition in the second paragraph of your letter you indicate that a position you had bid for in August 1980 or thereabout had been awarded to a junior employee. There is no record of a claim having been filed by you in that regard." Plaintiff Tollakson argues that, because he first discovered BRAC's failure to submit his claim when he received the September 27, 1983, letter, the date of that letter should serve as the commencement date for the statute of limitations. Plaintiff Tollakson does not claim that he made any effort between late 1981 until his letter in 1983 to investigate whether a claim had been filed. Plaintiff Tollakson's claim is barred by the six month statute of limitations.

These rulings dispose of all claims in *Reece,* all claims by engine service employees in *Newton,* of claims in *Chambers,* all claims except the claims against defendant Brotherhood of Locomotive Engineers (BLE) in *Swift,* all claims in *King,* all claims except the claims by plaintiff Boll in *Boll,* and all claims in *Van Dee.*

BLE moves to dismiss the claims against it in *Swift,* claiming that the summons and complaint were not served. The sheriff's return expressly shows that service was not accomplished. Plaintiff argues that counsel for BLE appeared at a mandatory scheduling conference in the *Reece, Newton,* and *Diltz* cases and that this appearance and the actual knowledge of defendant BLE of the *Swift* lawsuit are adequate to create service. Assuming that the appearance of counsel for BLE at the scheduling conference for *Reece, Newton,* and *Diltz* could be construed as an appearance in *Swift,*[4] an appearance before an objection to service is made does not waive the objection. *Burroughs Corp. v. Carsan Leasing Co.,* 99 F.R.D. 528, 531 (D.N.J. 1983); *see also* Fed. R. Civ. P. 12(h)(1) (stating when an objection to service of process is waived). Actual knowledge of a lawsuit by a defendant is not adequate to bar an objection to service of process. *Martin v. New York State Department of Mental Hygiene,* 588 F.2d 371, 373 (2d Cir. 1978).

Plaintiffs in *Swift* claim that their complaint against BLE should not be dismissed for failure to serve within 120 days as required under Fed. R. Civ. P. 4(j) because

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[4]The Order on Scheduling referred to by plaintiff does state that it was to be filed and have general application to *Swift.*

they have shown "good cause" within the meaning of Rule 4(j). They ask the court to give them additional time to properly serve BLE. I believe that absent a showing of prejudice to defendants I should be liberal when determining whether good cause exists under Fed. R. Civ. P. 4(j). However, in view of the fact that the sheriff's return expressly shows that service was not made, I cannot find good cause, even under a liberal standard. Plaintiffs' complaint will be dismissed without prejudice as against defendant BLE.

BRAC moves to dismiss and for summary judgment as to the claims by plaintiff Boll in *Boll,* asserting that the allegations fail to establish facts showing a breach by defendant BRAC of its duty of fair representation and asserting that the dispute resolution procedure has not been exhausted. The allegations are adequate and plaintiff Boll has no duty to exhaust her claim against the union prior to bringing suit in federal court. *See Raus v. Brotherhood Railway Carmen of the United States and Canada,* 663 F.2d 791, 795-96 (8th Cir. 1981).

IT IS ORDERED that all defendants' motions as to the section 105 claims, section 122 claims, and claims based on the March 4th, 1980, agreement are granted.

IT IS FURTHER ORDERED that all defendants' motions based on the statute of limitations are granted.

IT IS FURTHER ORDERED that BLE's motion to dismiss the complaint in *Swift* for failure to properly serve is granted.

IT IS FURTHER ORDERED that BRAC's motions to dismiss and for summary judgment as to plaintiff Boll's claims in *Boll* are denied.

IT IS FURTHER ORDERED that the complaints in *Reece, Chambers, King, Swift,* and *Van Dee* are dismissed, except that the *Swift* complaint is dismissed without prejudice as to defendant BLE.

IT IS FURTHER ORDERED that the unfair representation claims by engine service employees in *Newton* are dismissed.

IT IS FURTHER ORDERED that all claims except the unfair representation claims of plaintiff Boll are dismissed from the *Boll* case.

DATED this 19th day of February, 1986.

/s/ Harold D. Vietor
HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

(Filed February 19, 1986)

VANE NEWTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL
v.	)	NO. 83-641-D
	)	
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	JUDGMENT
	)	
Defendants.	)	

JOHN E. REECE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL
	)	NO. 83-640-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
	)	
Defendants.	)	

JACK L. CHAMBERS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL
	)	NO. 84-79-B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

ROGER SWIFT, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-80-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

HAROLD L. KING, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-81-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

ANGELINE V. BOLL, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-82-B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

JAMES L. VAN DEE, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. 84-83-B
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
Defendants.	)	

IT IS ORDERED AND ADJUDGED that all defendants' motions as to the section 105 claims, section 122 claims, and claims based on the March 4th, 1980, agreement are hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that all defendants' motions based on the statute of limitations are hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that BLE's motion to dismiss the complaint in *Swift* for failure to properly serve is hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that BRAC's motions to dismiss and for summary judgment as to plaintiff Boll's claims in *Boll* are hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that the complaints in *Reece, Chambers, King, Swift,* and

Van Dee are hereby dismissed, except that the *Swift* complaint is dismissed without prejudice as to defendant BLE.

IT IS FURTHER ORDERED AND ADJUDGED that the unfair representation claims by engine service employees in *Newton* are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that all claims except the unfair representation claims of plaintiff Boll are hereby dismissed from the *Boll* case.

DATED this 19th day of February, 1986.

/s/ James R. Rosenbaum
JAMES R. ROSENBAUM, Clerk
Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

(Filed April 29, 1986)

ANGELINE V. BOLL, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL
v.	)	NO. 84-082-B
	)	
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	NUNC PRO TUNC ORDER
	)	
Defendants.	)	

VANE NEWTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL
	)	NO. 83-641-D
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, et al.,	)	
	)	
Defendants.	)	

Plaintiffs have moved in the *Boll* and *Newton* cases for a determination and direction for entry of final judgment under Fed. R. Civ. P. 54(b). Oral arguments were heard on April 28, 1986.

The court determines pursuant to Fed. R. Civ. P. 54(b) that as to the rulings of this court entered on February 19, 1986, in the *Boll* and *Newton* cases, and entered on

April 16, 1985, in the *Newton* case, there is no just reason for delay in entering judgment. This determination as well as a direction to the clerk to enter judgment should have been made a part of the February 19, 1986, order. The clerk's entry of judgment in the *Boll* and *Newton* cases dated February 19, 1986, shall stand as the judgment of this court under Fed. R. Civ. P. 54(b).

DATED this 29th day of April, 1986.

/s/ Harold D. Vietor
HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

STATUTES INVOLVED

ROCK ISLAND TRANSPORTATION AND EMPLOYEE ASSISTANCE ACT

Section 105 (45 U.S.C. § 1004).

a. Each person who is an employee of the Rock Island Railroad on August 1, 1979, and who, prior to January 1, 1981, is separated of furloughed (other than for cause) from his employment with such railroad, or from his employment with another rail carrier providing temporary service over lines on the Rock Island Railroad, as a result of a reduction of service by such railroad or such temporary service carrier shall, unless found to be less qualified than other applicants, have the first right of hire by any other rail carrier that is subject to regulation by the Commission for any vacancy which is not covered by (1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulations, or Executive order, or by order of a Federal or State court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this Section, a rail carrier shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.

b. The rights afforded to Rock Island railroad employees by this section shall be coequal to the rights afforded to Chicago, Milwaukee, St. Paul and Pacific Railroad Company employees by Section 8 of the Milwaukee Railroad Restructuring Act. (45 U.S.C. 907).

Section 122 (45 U.S.C. § 1017).

(a) The Commission may authorize any rail carrier willing to do so voluntarily to use the tracks and facilities of the Rock Island Railroad or the Milwaukee Railroad. The use of such tracks and facilities shall be under such terms of compensation as the carriers establish between themselves, or if the carriers are unable to agree, under such terms of compensation as the Commission finds to be reasonable.

(b) In carrying out the provisions of this section, the Commission shall require, to the maximum extent practicable, the use of the employees who would normally have performed work in connection with the traffic subject to the action of the Commission.

(c) As used in this section, the term "Milwaukee Railroad" means the Chicago, Milwaukee, Saint Paul and Pacific Railroad Company.

REGIONAL RAIL REORGANIZATION ACT,
as amended

(Title 45)

§ 797b. Preferential hiring

(a) General

Any employee who is deprived of employment shall have the first right of hire by any other railroad for a vacancy for which he is qualified in a class or craft (or in the case of a non-agreement employee, for a non-agreement vacancy) in which such employee was employed by the Corporation or a predecessor carrier for not less than one year, except where such a vacancy is covered by (1) an affirmative action plan, or a hiring plan designed to elimi-

nate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan. For purposes of this section, a railroad shall not be considered to be hiring new employees when it recalls any of its own furloughed employees.

(b) Status

The first right of hire afforded to employees under this section shall be coequal to the first right of hire afforded under sections 907 and 1004 of this title.

§ 797c. Central register of railroad employment

(a) Register

(1) The Railroad Retirement Board (hereafter in this section referred to as the "Board") shall prepare and maintain a register of persons separated from railroad employment after at least one year of completed service with a railroad who have declared their current availability for employment in the railroad industry. The register shall be subdivided by class and craft of prior employment and shall be updated periodically to reflect current availability.

(2) Each entry in the register shall include, or provide access to, basic information concerning the individual's experience and qualifications.

(3) The Board shall place at the top of the register those former railroad employees entitled to priority under applicable provisions of law, including this chapter.

(b) Corporation employees

As soon as is practicable after August 13, 1981, the Corporation shall provide to the Board the names of its former employees who elect to appear on the register and who have not been offered employment with acquiring railroads.

(c) Vacancy notices

(1) Each railroad shall timely file with the Board a notice of vacancy with respect to any position for which the railroad intends to accept applications from persons other than current employees of that carrier.

(d) Placement

The Board shall, through distribution of copies of the central register (or portions thereof) to railroads and representatives of classes or crafts of employees and through publication of employment information derived from vacancy notices filed with the Board, promote the placement of former railroad employees possessing requisite skills and experience in appropriate positions with other railroads.

(e) Employment applications

In addition to its responsibilities under subsections (a) through (d) of this section, the Board shall facilitate the filing of employment applications with respect to current vacancies in the industry by former railroad employees entitled to priority under applicable provisions of law, including this chapter.

(f) Expiration

The provisions of this section shall cease to be effective on the expiration of the 6-year period beginning on August 13, 1981.

(g) Resolution of disputes

Any dispute, grievance, or claim arising under this section, section 797b of this title, section 907 of this title, or section 1004 of this title shall be subject to resolution in accordance with the following procedures:

(1) Any employee with such a dispute, grievance, or claim may petition the Board to review and investigate the dispute, grievance or claim.

(2) The Board shall investigate the dispute, grievance, or claim, and if it concludes that the employee's rights under this section, section 797b of this title, section 907 of this title, or section 1004 of this title may have been violated, the dispute, grievance, or claim shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(3) In the case of any violation of this section, section 797b of this title, section 907 of this title, or section 1004 of this title, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award such relief, including back pay, as may be necessary to enforce the employee's rights.

§ 797m. Arbitration

Any dispute or controversy with respect to the interpretation, application, or enforcement of the provisions of this subchapter, except sections 797b, 797c, 797g, and 797l of this title, or section 1144 of the Northeast Rail Service Act of 1981, and except those matters subject to judicial review under section 1152 of the Northeast Rail Service Act of 1981 [45 U.S.C.A. § 1105], which have not been resolved within 90 days, may be submitted by either party to an Adjustment Board for a final and binding decision thereon as provided in section 153 of this title, in which event the burden of proof on all issues so presented shall be on the Corporation, or the Association, where appropriate.

Supreme Court, U.S.
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No. 88-968

In The

Supreme Court of the United States

October Term, 1988

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioner,

v.

VANE NEWTON, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Court of Appeals could properly resolve an outstanding controversy between the parties after determining that the individual respondents had no right to recover money damages in federal court.

LIST OF PARTIES

The petition listed a number of individual respondents in the caption of the case, but excluded other individuals who did not file any complaint against petitioner. Because the rights of most of those individuals may be affected by the outcome of the petition, they hereby appear as respondents in this matter and join the individuals previously designated as respondents in the filing of this brief in opposition. These additional respondents are named in the petition at Pet. ii-iv. However, the following individuals do not join in the filing of this brief or in appearing as respondents in this matter: Sam H. Dean, Donald E. Bisgaard, Robert W. Shaner, La Don E. Crane, Arnold M. Scheel, Frank M. Ramey, A. M. McQuade, Lloyd G. Andrews, and John R. Vincent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. The Decision Below Does Not Raise The Question Presented In The Petition. 7

II. The Unique Nature Of This Case Means That It Raises No Issues Of National Importance Which This Court Should Resolve 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 14

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) 8

Butler v. Local Union 823, 514 F.2d 442 (8th Cir. 1975) 9

Chicago & North Western Transportation Co. v. United Transportation Union, 111 L.R.R.M. 2642 (D.D.C. 1982) 8

Conticommodity Services Inc. v. Phillip & Lion, 613 F.2d 1222 (2d Cir. 1980) 12, 14

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 3, 4, 12

Delaware State College v. Ricks, 449 U.S. 250 (1980) 13

International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487 (1972) 14

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 14

Niro v. Fearn International, Inc., 827 F.2d 173 (7th Cir. 1987) 14

Reiter v. Sonotone, 442 U.S. 330 (1979) 9

Santos v. District Council of New York, 619 F.2d 963 (2d Cir. 1980) 13

Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3d Cir. 1984) 12

TABLE OF AUTHORITIES–Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-5(f) 13

Railway Labor Act

45 U.S.C. § 151 *et seq.* 3

45 U.S.C. § 153 First (r) 4, 5

Regional Rail Reorganization Act

45 U.S.C. § 797b 2

45 U.S.C. § 797c 2

45 U.S.C. § 797c(f) 5, 6, 8

45 U.S.C. § 797c(g) 5, 6, 8

45 U.S.C. § 797m 2

Rock Island Transition and Employee Assistance Act

45 U.S.C. § 1001 *et seq.* ..... *passim*

45 U.S.C. § 1004 2

45 U.S.C. § 1017 2

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

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v.

VANE NEWTON, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, former employees of the Chicago, Rock Island & Pacific Railroad Company ("Rock Island"), respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioner, Brotherhood of Locomotive Engineers ("BLE"), seeking review of the Court of Appeals for the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 850 F.2d 1255 (Pet. App. 1a-46a). That opinion was issued upon a request for rehearing and superseded the court's earlier opinion which was

reported at 836 F.2d 1493 (Pet. App. 47a-91a). The opinions, rulings, orders, and judgment of the United States District Court for the Southern District of Iowa which form the basis for the Court of Appeals' opinion are all unreported (Pet. App. 93a-127a).

JURISDICTION

The decision of the Court of Appeals upon rehearing was issued on June 15, 1988. Petitioner's petition for rehearing and suggestion for hearing en banc was denied on September 14, 1988 (Pet. App. 92a).

Petitioner filed its petition for a writ of certiorari on December 13, 1988. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 105 and 122 of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1004, 1017, and 45 U.S.C. §§ 797b, 797c, and 797m are set forth at Pet. App. 128a-133a.

STATEMENT OF THE CASE

1. On November 18, 1983, some of the employee respondents filed a lawsuit against the Chicago & North Western Transportation Company ("CNW"), the United Transportation Union ("UTU"), and the BLE. *See Newton*

v. CNW, Civil No. 83-641-D (S.D. Iowa 1983).[1] The complaint in that case alleged that the defendants violated a contract entered into between numerous parties on March 4, 1980 ("March 4th Agreement"), provisions of the Rock Island Railroad Transition and Employees' Assistance Act ("RITEA"), 45 U.S.C. § 1001 *et seq.*, and the duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (Joint Appendix 1148-98).[2] *See also* Pet. App. 104a.

The complaint requested substantive relief in the form of damages against all defendants, including petitioner. The complaint also requested that the Newton respondents be given seniority with CNW which dovetailed with the seniority of other CNW employees. The complaint was based on the Newton respondents' interpretation of the March 4th Agreement and the RITEA.

In response to the complaint, the defendants raised several arguments. The defendants argued that the Newton respondents failed to exhaust the "administrative remedies" provided by the RITEA and the March 4th Agreement, since the Newton respondents had not sought to have their claims arbitrated. The Defendants also argued that based on the reasoning of this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), a six month statute of limitations prevented the district court from having jurisdiction to hear the case.

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[1] The respondents who were plaintiffs in *Newton* shall be referred to as the "Newton respondents".

[2] The designation "Joint Appendix" refers to the Joint Appendix filed with the Court of Appeals in this case.

The defendants filed summary judgment motions arguing, in part, that the claims in the complaint fell outside the six month limitations that should be applied to the case, and hence the district court did not have jurisdiction. The Newton respondents argued that a two year statute of limitations based upon a similar two year limitation period contained in Section 3 First (r) of the Railway Labor Act, 45 U.S.C. § 153 First (r), should be used rather than a six month period. The respondents also argued that the statute of limitations did not start running until a reasonable time after June 20, 1983 – the date the bankruptcy court issued final approval of the sale of the Rock Island assets to CNW. They argued that the February 16, 1982, agreement was merely interim and not final until the transfer was approved, because there was uncertainty regarding which railroad would finally control the railroad lines formerly operated by Rock Island. They further argued that the facts contained in the affidavits of the Newton respondents indicated that, in any event, a question of fact existed as to whether the statute of limitations should be tolled because of certain inequitable conduct by the defendants. The district court granted the defendants' summary judgment motions.

2. On appeal to the Eighth Circuit, the defendants argued that the district court's decision should be affirmed because the applicable six month statute of limitation deprived that court of jurisdiction (Pet. App. 20a). In particular, they argued that the same reasoning which supported a six month statute of limitations in *DelCostello*, should be followed, so that no action which accrued prior to May 18, 1983, could be brought in federal court. They further argued that the statute of

limitations should have started running with a signing of an implementing agreement between the BLE and CNW on February 16, 1982, allocating seniority between former Rock Island employees and incumbent CNW employees.

The respondents in the consolidated appeals again argued that the appropriate statute of limitations to apply to cases under the Railroad Labor Act is the two year period specified in 45 U.S.C. § 153 First (r). The respondents argued that the two year period specified in that section more accurately reflected a congressional determination regarding the appropriate time limit for resolving employment disputes in the railroad context. The respondents again argued that the statute of limitations did not begin to run until after June 20, 1983, when the CNW purchase was finalized.

The parties disagreed about whether the respondents had any right to arbitration under RITEA (Pet. App. 40a). The defendants argued that the statutory arbitration provision in 45 U.S.C. § 797c(g) no longer applied because of the sunset provision in 45 U.S.C. § 797c(f) (Pet. App. 40a). The respondents, on the other hand, argued that the lack of an arbitration provision strengthened their argument that they could bring an independent federal action.

3. The Eighth Circuit issued its initial ruling on January 8, 1988. Following the granting of petitions for rehearing, the court issued the opinion which the BLE asks this Court to review (Pet. App. 1a-46a).

The Eighth Circuit held that the respondents could not bring, at this time, an independent cause of action for money damages under the March 4th Agreement or under the RITEA (Pet. App. 20a-24a). The court also held

that the claims by the respondents based upon unfair representation were barred by the statute of limitations (Pet. App. 24a). Thus, the court concluded that respondents' substantive claims for money damages could not be brought in federal court (Pet. App. 25a). The Court, however, went on to resolve other controversies which existed between the parties by declaring the rights which each party had under the March 4th Agreement and the RITEA.

In particular, the court's opinion resolved a controversy between the Newton respondents and the BLE regarding the availability of arbitration and the need for the Newton respondents to have used arbitration prior to the filing of the lawsuit. The court determined that the sunset provision of 45 U.S.C. § 797c(f) was not meant to remove the disputes between the Newton respondents and the petitioner under RITEA from the arbitration procedures established by § 797c(g). As to arbitration of the March 4th Agreement, the court held that the Newton respondents had the right to have a neutral arbitrator determine whether their seniority rights were adequately protected under the terms of the February 16, 1982, agreement between CNW and the BLE (Pet. App. 45a). The court noted, however, that an arbitrator would have to determine whether the Newton respondents' claims under the March 4th Agreement and RITEA were barred by the equitable doctrine of laches. The court described some, but not all, of the factors that an arbitrator should take into account in making a laches determination (Pet. App. 45a).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because the arguments contained in the Petition are based on a misreading of the Eighth Circuit's opinion. Moreover, given the unique circumstances surrounding this case, there are no conflicting decisions among the courts of appeals nor does the petition present an important issue of federal law.

I. The decision below does not raise the Question Presented in the petition.

The sole Question Presented in the petition (Pet. i) is whether the court below erred in stating that the Newton respondents had the right to have an arbitrator determine whether their rights were properly protected when the "substantive claims" could not be brought in federal court. That Question and the Argument in the petition indicate that the petitioner has misread the Eighth Circuit's opinion, and hence raises issues not presented by the Eighth Circuit's opinion. Because the issues raised in the petition are not rooted in the opinion at issue, this Court should dismiss the petition.

1. The petition argues that the Eighth Circuit's opinion improperly dealt with the arbitration rights available to the Newton respondents because the court stated: "Given the fact that the appellants' substantive claims cannot properly be brought in federal court, we now turn to the task of determining what remedies, if any, remain available to them." *See* Pet. 13, *quoting*, Pet. App. 70a. Petitioner interprets that language to indicate that the remaining portion of the court's decision was made following a determination that the court did not

have jurisdiction to hear the entire case. Petitioner's interpretation is based on its misreading of the opinion.

As noted above, part of the thrust of the *Newton* complaint was a request for money damage. However, the complaint also raised issues regarding the interpretation of the March 4th Agreement and the RITEA which petitioner and respondents debated during the course of this litigation. Such issues are to be decided by federal courts. *See Chicago & North Western Transportation Co. v. United Transportation Union*, 111 L.R.R.M. 2642, 2643 (D.D.C. 1982) (interpretation of March 4th Agreement is within the "province of the federal courts"). *See generally Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972) (contracts governed by federal labor statute are "governed and enforceable by federal law, in the federal courts").

The issues in controversy centered around the need for the respondents to have sought arbitration before filing the present lawsuit and the affect of the sunsetting provision on the arbitration provisions that were added to the RITEA.[3] Indeed, petitioner itself raised the arbitration issues and argued forcefully regarding those issues.

When the court below stated that the "substantive claims" raised by the complaint could not be brought in federal court, the court was therefore referring to the fact

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[3] To help it decide the dispute regarding the applicability of 45 U.S.C. § 797c(g) in light of the sunset provision in § 797c(f), the Eighth Circuit requested the parties to submit a post-argument memorandum dealing with that issue.

that the claim for money damage was barred because of the statute of limitations and other jurisdictional problems. The statement by the court, however, did not mean that no controversy existed between the parties. Instead, as the rest of the opinion shows, the court determined that a controversy did exist, that it had jurisdiction to decide the controversy, and that it could declare the rights held by the respondents. *Cf. Butler v. Local Union 823*, 514 F.2d 442, 454 (8th Cir. 1975) (a final judgment should grant the relief to which a party is entitled, even if that relief was not requested in the pleadings).

Therefore, when the court below used the phrase "substantive claims" it did not mean "all claims", but instead referred to the claim for money damages. The court's declaratory relief under the March 4th Agreement and RITEA did not fall within the phrase "substantive claim" and hence the court's decision is not contradictory. Moreover, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute". *Reiter v. Sonotone*, 442 U.S. 330, 341 (1979). Thus, the language in the opinion below is to be read in conjunction with the entire opinion. When it is read in context, it can be seen that petitioner has misinterpreted the Eighth Circuit's reference to the "substantive claims" of the respondents.

2. Petitioner also incorrectly interprets the Eighth Circuit's opinion to mean that the court "set[] aside the seniority implementing agreement . . . [and] improperly interjected itself into the bargaining process, destroying the consensual processes between the craft representative and the rail carrier" (Pet. 23). The court, however, did not set aside the February 16, 1982, agreement as it related to

members of the BLE. The court *did not* throw out that agreement, but only stated that the Newton respondents should have an opportunity to have their claims submitted to arbitration (Pet. App. 45a).

In making that argument, petitioner attempts to read language contained in the original Eighth Circuit opinion into the opinion issued after rehearing. In the original opinion, the court determined that a "fundamental impropriety" (i.e., the improper representation by the BLE) permeated the February 16, 1982, implementing agreement to an extent that the agreement was rendered invalid (Pet. App. 84a). In the opinion issued after rehearing, however, the Eighth Circuit did not reach the same conclusion. Instead, the court merely determined that the Newton respondents had the ability to seek arbitration, but did not hold that the February 16, 1982, agreement between CNW and BLE was invalid (Pet. App. 45a).

Indeed, upon rehearing, the Eighth Circuit restructured that portion of its opinion dealing with the arbitration issues. The reissued opinion makes clear that the court's decision relating to the Newton respondents was based on the fact that arbitration was still available under the terms of the RITEA and the March 4th Agreement, just as it was available to the "new hire" and "non-hire" appellants. Although the court's opinion does not contain extensive analysis regarding that point, the structure of the opinion indicates that its basis for declaring the respondents' rights to arbitration was based on its analysis in the previous section of the opinion, rather than its analysis regarding any UTU misconduct.

The court's opinion establishes a consistent scheme requiring that the respondents first seek arbitration of any dispute involving the February 16, 1982, agreement before seeking review of the merits in federal court. Thus, the court examined the merits of the one claim which had gone to arbitration, while referring all other claims to arbitration. The court's opinion, therefore, did not decide whether the CNW-BLE agreement was invalid, but instead referred that issue to arbitration for resolution.[4]

3. To the extent that the opinion below indicated that arbitration was available even though more than six months had passed from the signing of the agreement at issue, the decision is neither surprising nor incorrect. The court held that because the arbitration provisions and the RITEA did not contain a time limit for bringing arbitration, that the respondents were not automatically barred from seeking arbitration (Pet. App. 40a-43a). Thus, the court determined that even though the respondents could not bring unfair representation claims in federal court, they could still seek arbitration, subject to a defense of laches.

Petitioner incorrectly argues that the Eighth Circuit's approach does not square with this Court's reasoning in

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[4] The above interpretation demonstrates the incorrectness of the BLE's argument that the lower court improperly used the problems with the UTU arbitration to invalidate the CNW-BLE agreement (Pet. 20). The problems with the UTU's bargaining of the implementing agreement have already gone to arbitration, while those connected with the BLE's bargaining have not. Thus, the arguments in the petition based on that unfounded assumption by petitioner should be disregarded.

DelCostello. However, *DelCostello*, and cases decided subsequent to that opinion, have dealt with whether a federal six month statute of limitations impliedly applies to breaches of the duties established by certain federal labor statutes. No case has ever held or implied that a six month limitation period exists for demanding arbitration under a contractual arbitration procedure or under a statutory provision creating an arbitration procedure. Indeed, if such a period were implied into a contract, the Court, rather than the parties, would be establishing contractual time limits for arbitration procedures.

Generally, a collective bargaining agreement governs the use of arbitration, and such an agreement sets the length of time which a party or an employee has to initiate a request for arbitration. The six month *DelCostello* period applied to labor cases has no relation to the time period specified for arbitration. Many contractual arbitration time limits are short, and may be as short as 48 hours. Other time limits for arbitration are much longer *Cf. Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1190 (3d Cir. 1984) (contractual provisions in labor agreement may *prevent* bringing of dispute for one year); *Conticommodity Services Inc. v. Phillip & Lion*, 613 F.2d 1222, 1226 (2d Cir. 1980) (describing a one-year period for seeking arbitration in the non-labor context). Therefore, the six month statute of limitations is not related to the ability of an employee to file an arbitration claim under a collective bargaining agreement.

This concept can best be illustrated by a hypothetical example from an arbitration context slightly different from the one at issue. Assume that parties to a collective bargaining agreement have agreed that because of past

discrimination, any discrimination claim brought by an employee can go to arbitration up to one year following the alleged discriminatory act. Federal law and most state laws only allow a person six months for the filing of a discrimination claim with the appropriate agency. *See, e.g.*, 42 U.S.C. § 2000e-5(f). Failure to file within that time period bars a subsequent lawsuit. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Under that scenario, if an employee attempts to file a discrimination complaint with the appropriate agency seven months after the alleged act, the agency will dismiss his claim immediately. If the employee then files a lawsuit, the court will state that the employee's action is barred by the applicable limitation period. However, if the matter reached the court quickly enough, the court could correctly indicate that while it had no jurisdiction to hear the substantive discrimination case, it could declare that arbitration under the contract was still available to the plaintiff because the arbitration period specified in the agreement had not yet expired. Thus, a person can be denied access to a court regarding a claim, while still having the ability to raise that claim in an arbitral forum. *Cf. Santos v. District Council of New York*, 619 F.2d 963, 969 (2d Cir. 1980) (accrual of cause of action for statute of limitation purposes may not preclude the availability of other relief in a non-judicial forum).

In this case, the court below made a similar decision to the hypothetical decision described above. The court held that it did not have the ability to hear the claim for damages. The court, however, also stated that because there was no time limit specified for when a claim for arbitration must be brought, the respondents could bring

a claim for arbitration subject to the defense of laches.[5] The court also correctly indicated that it was for the arbitrator rather than the court to determine whether the claim for arbitration was barred under the doctrine of laches. *See International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491-92 (1972) (if a broad arbitration clause exists with no specified time limit for seeking arbitration, an arbitrator is to decide the laches issue).

II. The unique nature of this case means that the petition raises no issues of national importance which this court should resolve.

1. On the issue presented by the petitioner, the decision of the court below does not conflict with any opinions of this Court or of any other court. Therefore, there is no conflict among the lower courts that should be resolved by this Court.

This case arose out of the discontinuation of service of the Rock Island railroad. The respondents know of no other cases pending or decided in any other court of appeals which deal with the issue of the availability of

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[5] The lower court properly determined that arbitrator should, in the first instance, determine the timeliness of a request for arbitration. *See Conticommodity*, 613 F.2d at 1227; *Niro v. Fearn International, Inc.*, 827 F.2d 173, 176 (7th Cir. 1987) (arbitrators are to decide procedural issues in the first instance). *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-59 (1964) (describing general powers of arbitrators to decide "procedural" and "substantive" issues). *Cf. AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986) (describing generally when disputes should be referred to arbitrators).

arbitration for former Rock Island employees as presented in this case. Petitioner, however, argues that the decision below conflicts with other decisions on several points. But, as noted above, those arguments are based on a misreading of the lower court's opinion and existing case law. The lower court did not, as petitioner argues, order that certain relief be granted after finding that it did not have jurisdiction over the entire case. Instead, the Eighth Circuit determined that there was no subject matter jurisdiction over certain portions of the case, and no meritous issues on another part of the case due to the statute of limitations, while impliedly holding that there was jurisdiction over another existing and remaining portion of the case. When the case below is interpreted in that fashion, no conflict exists between that decision and any other decisions.

2. The circumstances giving rise to this case are unique. The case involved the closure of a railroad, the reaching of a broadly worded agreement (i.e., March 4th Agreement) regarding, among other things, the absorbtion of Rock Island employees into any of a number of potential new carriers, the passage of a federal statute (i.e., RITEA) specifically designed to meet the problems of the Rock Island situation, and the failure by at least one union to properly act during the negotiations regarding seniority. The combination of events which preceded the filing of the lawsuits at issue indicate that the resolution of particular matters as raised by this writ will not have any important federal consequences.

Indeed, because of the filing of this lawsuit and the opinion issued by the Eighth Circuit, it is doubtful that

any other rail carriers, unions, or employees would conduct themselves in the same manner as those parties acted in this case. Moreover, in light of the case below, Congress itself may draft legislation dealing with the closure of a rail carrier more specifically and clearly so that the needs and expectations of all future parties are clarified further than they were in this instance.

Because the situation giving rise to these cases is unique, and because it is doubtful that they will be repeated, the petition raises no important issue of federal law which the Court should decide.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRUCE H. STOLTZE
(Counsel of Record)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312
(515) 274-1450
Counsel for Respondents

KRISTIAN ANDERSON
(On the Brief)
BRICK, SECKINGTON, BOWERS,
SWARTZ & GENTRY, P.C.
550 39th Street, Suite 200
Des Moines, IA 50312